CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

THE STATE OF MISSOURI.

MAY TERM, 1875, AT ST. JOSEPH.

[CONTINUED FROM VOL. LIX.]

MARIA CONN, Plaintiff in Error, vs. CHARLES M. FERREE, et al., Defendants in Error.

- 1. Practice, civil—Judgment for costs—Appeal.—A judgment for costs is not a final judgment from which appeal will lie.
- Equity—Non-suit with leave, etc.—Appeal.—Whether in suit in equity, a non-suit with leave to move to set aside can be taken so as to bring the case before the Supreme Court for review, doubted.

Error to Livingstone Circuit Court.

Collier & Mansur, for Plaintiff in Error.

L. C. Slavens, for Defendants in Error.

Vories, Judge, delivered the opinion of the court.

This action was in the nature of a bill in equity brought by the plaintiff to set aside and cancel a deed of trust, executed by the plaintiff, on the ground that its execution had been procured by fraud.

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Upon the trial, the court having ruled adversely to the plaintiff and excluded her evidence which was offered to sustain her petition, she took a non-suit with leave to move to set the same aside.

Upon the taking of the non-suit by the plaintiff, the court entered the following judgment: "It is therefore considered and adjudged by the court that defendant recover of plaintiff and William C. Samuel, her surety, their costs in this behalf expended, and have execution therefor."

It appears from an additional or supplemental bill of exceptions filed by the plaintiff, that several days after the rendition of this judgment for costs the plaintiff filed her motion to set aside the non-suit, which was afterwards taken up and heard by the court and by the court overruled. No judgment of any kind was rendered upon the overruling of this motion.

There is no final judgment rendered in this case from which an appeal or writ of error will lie. (Buggess vs. Cox, 48 Mo., 278.)

The plaintiff is out of court by her voluntary act. Her suit was not dismissed by the court; but at the time judgment for costs was rendered, her suit was still in court, she still having the right to file her motion to set aside the non-suit taken. The motion was afterwards filed and overruled; but no judgment rendered against plaintiff other than the one previously rendered for costs. (Bowie vs. Kansas City, 51 Mo., 454.)

It is also doubtful whether a non-suit with leave to set the same aside can be taken on a suit in equity so as to bring the case before this court to be reviewed. (Gill vs. Clark, 54 Mo., 415.)

The writ of error in this case is dismissed; the other judges concur.

Atchison County v. De Armond.

Atchison County, Defendant in Error, vs. William De Armond, Plaintiff in Error.

1. County roads—Commissioner appointed to let out contract for improving has no right to do the work himself.—A commissioner who is appointed by a County Court to "let out a contract" for certain road improvements, and to "superintend the same," and receives money to be used for that purpose, will be held responsible to the county for the money, if he fails to let out the contract, and cannot relieve himself by showing that he did the work himself, and that the amount received was actually expended by him in the improvements.

Error to Holt Circuit Court.

Durfee, McKillops & H. Parrish, for Plaintiff in Error.

A. H. Vories, for Defendant in Error.

Defendant was agent for the county, and could not contract with himself to do the work. (Grunnley vs. Webb, 44 Mo., 444; Rea vs. Copelin, 47 Mo., 80, 83; Wolcott vs. Lawrence Co., 26 Mo., 272; Denison vs. County of St. Louis, 33 Mo., 168.)

WAGNER, Judge, delivered the opinion of the court.

This suit was brought in the Atchison County Circuit Court, charging that plaintiff, through the County Court, had appointed defendant its commissioner and agent, to let out on contract work to be done in throwing up an embankment, and otherwise improving a public road in said county, and to superintend the same; that it gave him four hundred dollars to be applied to that purpose, and that he had failed to let said contract to have said work done, and failed to account for the money, but had converted the same to his own use; and judgment was prayed for the amount.

On defendant's application, a change of venue was awarded to the Holt County Circuit Court, where defendant filed an amended answer, admitting his appointment, the receiving of the \$400 to be used in and about the defraying of the expenses of the work; denied the conversion of the money, and then alleged that he "entered upon said work and did work therein, in throwing up embankments, digging the necessary

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ditches, drains to drain said part of said road, and carry off the water therefrom, and in furnishing timber, erecting the necessary culverts and bridges on said road, to the amount of all the money so paid the defendant." This latter part of the answer was, on the motion of plaintiff, stricken out as constituting no defense. The defendant excepted, and failing to file any further answer, a final judgment was rendered against him, and he sued out his writ of error.

The only question is, whether that part of the defendant's answer stricken out constituted any defence against plaintiff's claim. The allegation in the petition admitted by the answer, is, that plaintiff, through the County Court, appointed defendant a commissioner and agent, to let out certain work on contract and superintend the same, and that four hundred dollars was appropriated and delivered to defendant to pay for the work. The matter stricken out does not pretend that the defendant pursued his authority, but states that he entered upon and did the work himself, to the amount of the money he received. The appointment and agency were the extent of his authority, and he could legally proceed in no other manner than that contained in the power delegating the trust. Counties, in the erection of public works, are under the necessity of acting through agents, and those agents must pursue the authority conferred on them. An agent is not allowed to make a profit out of his trust, because no person having a duty to perform can be allowed to place himself in a situation in which his interest and his duty may conflict. The agency was to let out the contract and superintend the work; that implied that some person should be contracted with, and that the agent should superintend and see that he fulfilled his contract and complied with his agreement. But the agent could not contract with himself, nor was he a proper person to superintend his own work and determine his own compensation.

In building bridges the universal custom is to appoint a commissioner to let out the same by contract and superintend the construction; but I apprehend that it was never sup-

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posed that a commissioner could go on and do the work under his own superintendence, and then recover as on a quantum meruit.

The county had the authority to appoint the defendant a commissioner and agent for the purpose of making the contract. A contract was necessary to give any person any rights in the premises. Any other rule would lead to disastrous consequences, and allow the people's money to be squandered and frittered away by abuses of public trust, and through the instrumentality of faithless agents.

The judgment should be affirmed; all the judges concur.

IRA BROWN, Defendant in Error, vs. THOMAS TURNER, Plaintiff in Error.

 Landlord and tenant—Emblements, sale of.—A tenant not indebted for rent, although owing his landlord on other scores, has a right to sell a crop of his own raising.

Error to DeKalb Circuit Court.

S. G. Loring, for Plaintiff in Error.

The tenant abandoned the premises of his own accord, leaving the corn ripe but standing ungathered on the premises. Under this state of facts the emblements went to the landlord, and plaintiff could get no title to them, as against the defendant, through Taylor. (Brown vs. Thurston, 56 Me., 128: Tayl. Ld. & Ten., 5 ed., p. 397; Greenl. Cr. Real Pr., 253; Bear vs. Bretzer, 16 Penn. St. 175; Goff vs. Levan, Id., 181; White vs. Brown, 78 Lans., [N. Y.] 79; Calhoun vs. Curtis, 4 Metc., [Mass.] 415; Elliott vs. Powell, 10 Watts, 454; Willey vs. Connor, 44 Vt., 68; Tripp vs. Hasceig, 20 Mich., 254; Creed vs. Kirkham, 47 Ill., 349; Bain vs. Clark, 10 Johns. [N. Y.], 424; Matthews' Adm'r vs. Tobener, 39 Mo., 119; Alles vs. Hinckler, 36 Ill., 277; 1 Hill. Mort., 3 ed. p. 180, n. C.; McLean vs. Bovee, 24 Wis., 295.)

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Strong, for Defendant in Error.

Sherwood, Judge, delivered the opinion of the court.

Plaintiff brought suit on two promissory notes. Defendant pleaded as a defense to the action, that plaintiff was indebted to him in a much larger sum for corn sold and delivered by defendant to plaintiff, at the special instance and request of the latter, and judgment was asked for the residue of such amount after satisfying the notes in suit.

Upon trial had, without the intervention of a jury, the claim of the defendant was disallowed, and judgment rendered for the sum claimed in the petition.

The evidence tended to show that the corn was, under the direction of the plaintiff, gathered from the premises of the defendant, by one Glazier, to whom plaintiff had sold it, and also that it was purchased by plaintiff of one Taylor, the defendant's tenant, who, after the corn ripened, and before it was gathered, sold and received payment therefor and delivered possession thereof to plaintiff, and then left the premises.

It is entirely unnecessary to consider the declarations of law asked by defendant, as he failed in any manner to show that the corn was his. Taylor may have been the tenant of defendant, and may have been indebted to him, as the evidence also tended to show; but this indebtedness was not shown to have arisen from rent due, nor was it shown that any rent whatever was due to the defendant from Taylor, who under such circumstances, had a perfect right to sell the crop which he had raised on the premises.

The judgment is affirmed; the other judges concur.

Abererombie v. Ely, et al.

- James Abergrombie and Thomas Johnston, Co-partners, etc., Plaintiffs in Error, vs. Asher F. Ely, and The Board of Education of the Town of Cameron, Defendants in Error.
- Mechanic's lien—Public school houses not subject to.—A school house and lot, the
 title to which is vested in the State Board of Education, is not subject to a
 mechanic's lien. (Wagn. Stat., 907.)

Error to Clinton Circuit Court.

J. F. Harwood, for Plaintiffs in Error.

The 1st section of the Mechanic's Lien Law, (Wagn. Stat., 907) is broad enough to embrace school houses, and the law should be liberally construed in favor of laborers and material men. (Putnam vs. Ross, 46 Mo., 337; Oster vs. Rabenneau, Id., 595.) The cases of Dunn vs. North Mo. R. R. Co., (24 Mo., 493) and McPheeters vs. Merrimac Bridge Co., (28 Mo., 465) were decided under the special lien law applicable to St. Louis county, and did not embrace all the provisions of the general lien law, under which this action was commenced.

S. H. Corn and T. E. Turney, for Defendants in Error, relied on Dunn vs. North Mo. R. R. Co., 24 Mo., 493; Mc-Pheeters vs. Merrimae Bridge Co., 28 Mo., 465.

NAPTON, Judge, delivered the opinion of the court.

This suit is brought to enforce a mechanic's lien against a school house and the lots upon which it was erected, the title to which was vested in the Board of Education, who are codefendants; and the only question in the case, is, whether the building and lots so sued are within the meaning of the law in relation to mechanic's liens. (Wagn. Stat., 907.)

The terms of the law are sufficiently general to embrace school houses as well as all other buildings for public purposes; but the decisions of this court in Dunn vs. N. M. R. R. Co., (24 Mo., 493) and McPheeters vs. Merrimac Bridge Co., (28 Mo., 465) have restricted these terms of the special St. Louis act—and indeed of the general law which uses the

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same terms—to buildings, etc., belonging to private individuals. The reasons for this discrimination are set forth at large in the decisions, and it is unnecessary to repeat them. School houses undoubtedly occupy a position not less favored by the constitution and laws than bridges.

Besides, these decisions were made long anterior to the present lien law, and if the legislature had been dissatisfied with them, the terms of the law could have been easily modified so as to embrace such buildings. But the general law has adopted the same terms used in the special law, since the decisions referred to.

We think, therefore, the demurrer was properly sustained, and the judgment is affirmed.

HENRY BURGHART Defendant in Error, vs. HIRAM BROWN, Plaintiff in Error.

Promissory note—Verdict—Judgment—Assessing domages.—In suit on a note
where there is a general verdict for plaintiff, but no finding of the amount of
recovery, the court cannot proceed to enter up judgment therefor. (Snadon's
Adm'r vs. Nickell, 42 Mo., 169.)

Error to Livingstone Circuit Court.

J. M. Davis, with H. M. Pollard, for Plaintiff in Error.

C. H. Mansur, for Defendant in Error.

NAPTON, Judge, delivered the opinion of the court.

This case is in all respects like the case of Snadon's Adm'r vs. Nickell (42 Mo., 169).

In a suit on a note, the only defense was, that the defendant did not execute it, and there was a general verdict for the plaintiff. On this verdict the court entered a judgment for the amount of the note and interest, which it is plain, on the authority of the case cited, could not be done.

The judgment is therefore reversed and the cause remanded. The other judges concur.

Moses Greenabaum, et al., Respondents, vs. Thomas T. El-LIOTT, Adm'r of Samuel Taylor, deceased, Appellant.

- 1. Promissory note—Promise and refusal to surrender after payment—Double payment of note—Action to recover back money—Res adjudicata.—An administrator, after personal service, obtained judgment by default on a note given to the intestate, and realized the amount due, and the maker subsequently sued to recover back the money, claiming that the debt had already been paid to the deceased. The proof showed merely a promise of the latter to deliver up the note. Held, 1st, that the duty of surrendering it was a moral and not a legal obligation, and not a good consideration for the promise, and hence, that such agreement would not sustain the action against the administrator; 2nd, that the judgment in favor of that officer, in the suit brought by him, was res adjudicata; and the failure to set up therein the defense of payment conclusively barred the maker from subsequently prosecuting the claim. Such is the rule as now established in all cases, unless the party can show some ground for equitable interference.
- 2. Administration —Action against estate Limitation as to claims. The cause of action, against an administrator for money, alleged to have been wrongfully collected by him on a note, accrues at the date of the payment thereof. And, the statutory limitation of two years against such claims, being then in force, failure to present the claim against the estate within two years from the time of payment, will bar it, notwithstanding that the administration may have been commenced when the three years' limitation act was in operation.

Appeal from Chariton Circuit Court.

Charles A. Winslow, for Appellant.

I. Respondents having appeared to the action on the note commenced by Dewey and failed to make the defense of payment, cannot recover back the amount they have been compelled to pay on the judgment in that case. The payment of the note to Taylor in his lifetime, if made, was a good defense to the action on the note, and being simply a defense, should have been made at the time, and not having been so made, is res judicata. (LeGuen vs. Gouverneur, 1 Johns. Cas., 491; also opinion of Kent., J., p. 502; White v. Ward, 9 Johns., 232; Loomis vs. Pulver, 9 Johns., 244; Walker vs. Ames, 2 Cow., 428; Binck vs. Wood, 43 Barb., 315; Freem. Judg., §§ 285-89, and notes; Cadwaleder vs. Atchison, 1 Mo., 659; Yantis vs. Burdett, 3 Mo. 457; Hackworth vs. Zollars, 30 Ia., 433; Binford vs. Kersey, 48 Miss., 643.) The

case of Whitcomb vs. Williams, (4 Pick., 228) and the few other similar cases are no longer considered good law, and have either been explained away on their peculiar facts, or squarely overruled. (Hunt vs. Johnston, 23 Mo., 432; Woodburn vs. Renshaw, 32 Mo., 202; Price vs. Cannon, 3 Mo., 453; 1 Pars. Cont., [5 ed.] 428, et seq. and notes.)

II. Taylor's promise to deliver the note is without any legal force whatever. The note was paid and valueless in Taylor's hands, since a good defense existed against it; and in a proper case he might have been compelled to deliver it up to be canceled. He was no longer justified in retaining it. A naked promise to do what one is compelled in law or equity to do, is without consideration and void. (Crosby vs. Wood, 2 Seld., [N. Y.] 374; Farrington vs. Bullard, 40 Barb., [N. Y.] 512; Cowper vs. Green, 7 M. & W., 641; Russell vs. Buck, 11 Vt., 166; McDonald vs. Neilson, 2 Cow., 183; Price vs. Cannon, 3 Mo., 453.)

Conceding that a moral obligation really existed, that alone will not support a promise. (Mills vs. Wyman, 3 Pick., 207; 2 Am. Lead. Cas., [4 ed.] pp. 177-80; 1 Pars. Cont., [5 ed.] 430, et seq. and notes; Hunt vs. Johnston, 23 Mo., 432; Woodburn vs. Renshaw, 32 Mo., 197.) But there was no moral obligation resting on Taylor at the time he made the promise, within the meaning of the authorities. That obligation came into existence only upon the alleged second payment of the money, several years after the promise. (Cook vs. Bradley, 7 Conn., 57; Smith vs. Ware, 13 Johns., 257; Bently vs. Morse, 14 Johns., 468; Edwards vs. Davis, 16 Johns., 284, note (a.); Stafford vs. Bacon, 1 Hill., [N. Y.] 538; Ehle vs. Judson, 24 Wend., 97; Mills vs. Wyman, supra; 2 Am. Lead Cas., 177-80, [4 ed.]; 1 Pars. Cont., [5 ed.] 432, et seq. and notes; Kennerly vs. Martin, 8 Mo., 698.)

III. The court below erred in giving and refusing instructions on the statute of limitations. The limitation of two years applied. The demand accrued when the money was paid—November 19th, 1866—and at that time the statutes

of 1865 were in force. The demand ran two full years, and seven days over, between the day it accrued and the day it was presented—that is, between November 19th, 1869, and November 25, 1871—while the two years law was in force. The revision of 1865 contains no savings by which the three years limitations was continued in force as to existing administration. (Wagn. Stat., 86, § 19; 102, § 2; Callaway County vs. Nolley, 31 Mo., 393; Billion vs. Walsh, 46 Mo., 492; Gilker vs. Brown, 47 Mo., 105.)

A literal reading of the statute would bar all demands in the time limited after the granting of the first letters, but a series of decisions in this court has settled the rule otherwise where the demand accrues after the granting of letters. The statute in such cases only commences to run from the time the demand accrues, instead of the date of the letters. (Miller vs. Woodward, 8 Mo., 169; Finney vs. The State, 9 Mo., 227; Chambers vs. Smith, 23 Mo., 174; Burton vs. Rutherford, 49 Mo., 255.)

Shackelford, for Respondents, cited in argument, Whitcomb vs. Williams., 4 Pick., 228; 1 Pars. Cont., 356; 1 Sto. Cont., 431; Train vs. Gold, 5 Pick., 384; 8 Mo., 698; 49 Mo., 433.

WAGNER, Judge, delivered the opinion of the court.

This cause was originally brought in the Probate Court of Chariton county, and was presented in the shape of a demand against the estate of Samuel Taylor, deceased. There was a refusal to allow the demand in the Probate Court, and an appeal was taken to the Circuit Court. On a trial in the Circuit Court, before a jury, plaintiffs obtained a verdict and judgment for the amount claimed, and to reverse this judgment defendant has prosecuted his appeal.

The facts show, that on the 24th of March. 1863, the plaintiffs. Greenabaum, Oppenheimer and Chapman, executed their joint note to Samuel Taylor, for one thousand dollars, payable twelve months after date. The petition alleges, that in the spring of 1864, plaintiffs paid this note to Taylor. Sub-

sequent to this alleged payment Taylor died, and Dewey administered upon his estate. Among the assets that came to the hands of the administrator, was the note above mentioned, which was inventoried as a portion of the estate. Dewey, as administrator, sued the plaintiffs on the note in the Circuit Court.

The summons was served on Chapman, March 24, 1866, and the other parties were duly notified by publication, which was made returnable to the October Term, 1866. At the last named term all the defendants appeared and filed a joint answer, setting up payment of the note as their sole defense. At the same term of the court the answer was withdrawn, and judgment was rendered in favor of the administrator, for the amount of the note and interest.

Execution was issued on this judgment and levied on Chapman's land, who, on the 18th day of November, 1869, paid the amount of the judgment and costs to the sheriff. Elliott, the defendant here, succeeded Dewey as administrator, and on the 25th day of November, 1871, the plaintiffs commenced this proceeding in the Probate Court.

The gist of the action stated in the petition, is, that Taylor made a special promise, when the note was paid, to deliver the same to plaintiffs, and save them harmless from its second payment. This allegation was put in issue by the answer.

The only evidence in the record in reference to any settlement, payment or promise, is that given in the depositions of Green and Fitzpatrick, on the part of the plaintiffs. Green says, that when the settlement was made, it was with the distinct understanding that Taylor was to deliver up the old note, which was paid off, to Chapman, either that evening or at the first opportunity thereafter. Fitzpatrick testifies that he heard Taylor say after the settlement, that he would deliver the \$1000 note to Chapman that evening as they went home, or that he would bring it to Chapman that evening or the next day.

It is evident that this did not constitute such a promise as would maintain an action. When the note was paid off it

was in effect destroyed; its satisfaction utterly did away with its value. Taylor had no right to hold it further, and he could not make the giving up of it the consideration of a new promise. (Cowper vs. Green, 7 M. & W., 633.) The validity and legal effect of the note were gone, and the duty of surrendering it was merely a moral one.

A moral obligation by itself, is not a good consideration for a promise. To impart to it any binding character, there must be some antecedent legal liability to which it can attach. Parsons says the rule may now be stated as follows: "A moral obligation to pay money or to perfom a duty, is a good consideration for a promise to do so, where there was originally an obligation to pay the money or to do the duty, which was enforceable at law but for the interference of some rule of law. Thus, a promise to pay a debt contracted during infancy, or barred by the statute of limitations or bankruptcy, is good, without other consideration than the previous legal obligation. But the morality of the promise, however certain or however urgent the duty, does not of itself suffice for a consideration. In fact, the rule amounts at present to little more than a permission to a party to waive certain positive rules of law which would protect him from a plaintiff claiming a just and legal debt." (1 Pars. Cont., 5 ed., 434.)

But the more conclusive and controlling proposition of law as to the plaintiffs, is, that the matter has become res judicata, and they are not at liberty to dispute the verity of the former judgment by which their liability was solemnly adjudged. When the administrator, Dewey, commenced the action on the note, the plaintiffs appeared in court and filed their joint answer, setting up payment as a defense. They subsequently withdrew that answer, and permitted final judgment to be taken against them. They paid the amount on execution, and they cannot now be allowed to recover it back. If the note was paid to Taylor in his life time, that payment constituted a good defense to the action, and should have been taken advantage of at the time, and the failure of the plaintiffs, when they were thus sued and in court, to make the

proper defense, conclusively bars them now from averring anything contrary to the record.

This is the recognized, and I might say, at the present time, the universal doctrine. Some of the earlier decisions in Massachusetts announced a different rule, but they cannot be supported, and are not now regarded as authority. In the case of Rowe vs. Smith, (16 Mass., 306) the plaintiff had paid \$50 on a \$400 note and taken a receipt. Afterwards he was sued on the \$400 note, and judgment was entered against him for the whole amount. An action by the plaintiff to recover back the \$50, was sustained. Parker, C. J., stated that his first impression was against the recovery, but it was finally sustained on the ground that the defendant had received \$50 which he was not entitled to retain, and that he could not conscientiously be permitted to keep it.

The case of Loring vs. Mansfield, (17 Mass., 394) involves the same principle decided in Rowe v. Smith, with the difference of fact, that in the former case, the plaintiff in the second action appeared in the first and contested the recovery, but did not attempt to prove the payment for which he afterwards brought an action. The court decided, however, that he could not recover; the ground being substantially, that, having been in court, he ought to have proved his whole defense when he had an opportunity.

In neither case was there any actual trial as to the payment claimed to be recovered. This case, therefore, not only impairs the authority of Rowe vs. Smith, but in fact overrules it.

The case of Whitcomb vs. Williams, (4 Pick., 228) cited and greatly relied on by plaintiff's counsel, does not in the least aid him. The case went off on different grounds. The court say: "In this case a cause of action has been shown, independent of the judgment; nor was the proof of the judgment at all material to the merits of the case."

"There can be no doubt," says Freeman, "that the Massachusetts decisions are in direct conflict with the true rule upon the subject, both English and American, and they were induced by yielding to the hardships of the particular cases

in which they were pronounced, and are good illustrations of the maxim, 'that hard cases make bad precedents.'" (Freem. Judg., § 286; 2 Sm. Lead. Cas., 667.) "It is clear, that if there be a bona fide legal process under which money is recovered, although not actually due, it cannot be recovered back, inasmuch as there must be some end to litigation." (Duke de Cadoral vs. Collins, 4 Ad. & El., 867.)

A party having found a receipt for a debt which he had been compelled to pay by judgment, having sought to recover back the money paid, Lord Kenyon, before whom the case came, said; "I am afraid of such a precedent. If this action could be maintained, I know not what cause of action could ever be at rest. After recovery by procees of law there would be no security for any person." (Marriott vs. Hampton, 7 T. R., 269.)

In the recent case of Huffer vs. Allen, (L. R., 2 Exch., 15) it was declared, that, "it was not competent for either party to an action to aver anything, either expressing or importing a contradiction to the record, which, while it stands, is, as between them, of uncontrollable verity." To the same purport are nearly all the American cases. (Tilton vs. Gordon, 1 N. H., 33; Broughton vs. McIntosh, 1 Ala., 103; Mitchell vs. Sanford, 11 Id., 695; Corbet vs. Evans, 25 Penn. St., 310; Kirklan vs. Brown, 4 Humph., 174; Loomis vs. Pulver, 9 Johns., 244; Battey vs. Button, 13 Johns., 187.)

The case of Walker vs. Ames, (2 Cow., 428) was of special hardship. There had been a recovery on an account and also on a note given in settlement of the same account. The defendant in that action then sued to recover back one-half of the judgment thus improperly recovered. The court held that the action would not lie; "that there could be no end to litigation nor any security to a person," if such an action could be brought.

It may therefore be stated as the established rule, that where a defendant has been legally in court, and fails or neglects to make his defense if he has one, the judgment will be conclusive upon him, unless he can show some ground for equitable interference.

The court erred in deciding that the plaintiffs could maintain their action.

The statute of limitations was also interposed as a defense and overruled by the court. The record shows that Dewey, the original administrator, took charge of Taylor's estate January 3rd, 1866, and that on the 20th of the same month he published notice of his administration, requiring all persons having claims against the estate to exhibit them for allowance within three years. At that time three years was the limitation for allowing and classifying demands against an estate. In August, 1866, the statutes of 1865 took effect, limiting the time for allowance and classification to two years. On the 18th of November, 1869, Chapman, one of the plaintiffs to this suit, satisfied the judgment of the administrator against these plaintiffs, and at that time the cause of action, if any, accrued in their favor. The present demand was not exhibited for allowance until November 25th, 1871. It will be thus seen that more than two years had run from the time the cause of action had accrued, till it was presented. The demand accrued when the money was paid, to-wit: Nov. 18th, 1869, and at that time the two years' limitation was in force. There is no saving clause in the administration act, by which the two years' bar is excluded, where the demand accrued after it went into operation, although the administration was commenced under the three years' limitation act.

This court has held, under the limitation law in respect to real actions, that where ten years have elapsed from the taking effect of the law, the action is barred, although it first accrued under some act of limitations, which gave a longer period within which to bring it. (Calloway Co. vs. Nolley, 31 Mo., 393; Billion vs. Walsh, 46 Id., 492; Gilker vs. Brown, 47 Id., 105.)

The case here is stronger. The action accrued under the two years limitation, and must be governed by it, and as more than that time elapsed before it was brought, the plaintiff's claim was barred.

In any view that we can take of the case, the judgment is wrong, and it must be reversed. The judgment is reversed; the other judges concur.

WILLIAM BRADLEY, Respondent vs. CHARLES WEST, Appellant.

- Acknowledgment—Certificate, allegation of as to venue.—Where a conveyance
 is acknowledged before an officer authorized to take the same within the limits of his jurisdiction, it will be presumed that the acknowledgment was actually taken within such limits, without an averment of that fact contained in
 the certificate.
- 2. Land and land titles—Legal seizin follows legal title—Adverse possession, what necessary to overthrow—Statute of limitations.—Where one has the legal title, the legal seizin and possession follow; and any one setting up or claiming under an adverse possession, must show that he, or those under whom he claims, have had the open, notorious and continued adverse possession, under claim of right or color of title, for the period limited by the statute.
- 3. Land and land titles—Possession of part of a tract, with title to whole, possession of all—Ouster—Entry by claimant without legal title—Possession of, how restricted—Construction of statute.—Where the legal owner is in the actual possession of a part of the land of which he has the fee, the law invests him with the possession of the whole; and he can only be dispossessed by actual ouster; and one afterward entering on the land without the legal title, will be restricted in his possession to the part actually occupied or cultivated. The statute, (Wagn.Stat., 917, § 5) making the possession of part of a tract of land under a mere color of title, in certain cases, possession of the whole, applies only where there is no legal occupancy by the owner of any part.
- 4. Adverse possession—Proof of good faith, when not necessary.—In general it is sufficient that the possession of land be under claim of title, to clothe it with the character of an adverse holding, and to give it efficacy as a defense—when of sufficient duration to be a bar—without proof that the possession was taken in good faith. But there must be an intent to claim and possess the land.
- 5. Military bounty land—Entry upon, must be made when, etc.—Under a proper construction of the statute (Wagn. Stat., 915-16, §§ 1, 2) an entry upon military bounty land, to be valid and effectual must be made before the expiration of the time limited by § 1 that is, within two years after the taking of adverse possession; otherwise the right of action is gone, and whenever that right is barred, the right of entry is closed.

6. Legislature—Journals—How far evidence.—Printed copies of the journals of the legislature are only prima facie evidence of the original legislative rolls, and may be rebutted by testimony showing their inaccuracy. Hence they cannot be used in the Supreme Court, where not introduced as evidence in the trial of the cause below.

Appeal from Carroll Circuit Court.

L. H. Waters, for Appellant.

I. The deed from Horton to Bradley should have been excluded. It was acknowledged more than eight years after date, and the certificate fails to show that the justice acted in his own or in any town. (Carpenter vs. Dexter, 8 Wall., 513; Merchants Bank, etc. vs. Harrison 39 Mo., 433.)

II. The court erred in giving plaintiff's fifth instruction. This is not a case of mixed possession. Defendant, by his entry under claim of right and color of title, acquired seizin co-extensive with the premises covered by his deed. (Wagn. Stat., 917, § 5; Tyl. Ej., 904.) And if, after his entry, plaintiff took possession of any part of the land so entered upon, defendant was disseized only to the extent of the part actually so occupied. (Schultz vs. Lindell, 30 Mo., 310; Jackson, vs. Vermilyea, 6 Cow., 677.) In McDonald vs. Schneider, (27 Mo., 405) the true owner had the prior possession, and the defendant intruded thereon. The case of Griffith vs. Schwenderman, (27 Mo., 412) upon which the plaintiff relied in the court below, will not sustain this instruction. That case was substantially overruled in Crispin vs. Hannavan (50 Mo., 545).

III. This suit being to recover military bounty land, should have been begun within two years after the right of action accrued. (Wagn. Stat., 915, § 1.) This right accrued when defendant's possession became adverse. (Tyl. Ej., 927.) Hence, plaintiff's action is barred. (Totten vs. James, 55 Mo., 494.)

An entry made as a claim, to avoid the statute of limitations, must be while there is an existing right of possession, otherwise the right of entry is gone. (3 Cr. Dig. Tit., 31, ch. 2, §§ 16, 19, 21, 37; 2 Hill. Real Pr., 170, § 11; 156, § 7;

2 Sm. Lead. Cas., 592; 2 Greenl. Ev., § 545, note 3; Till. Ad. Ej., 100.) When the action of ejectment is barred, the right of entry is tolled. (Tyl. Ej., 70; Smith vs. Lorillard, 10 Johns., 356; Jackson vs. Wheat, 13 Johns., 43; Pillow vs. Roberts, 13 How., 472; Parish vs. Stephens, 3 Serg. & R., 298; Waln vs. Shearman, 8 Serg. & R., 357; Cranmer vs. Hall, 4 Watts & S., 36; Bigler vs. Karns, 4 Watts & S., 137; Bayard vs. Inglis, 5 Watts & S., 465; Blackw. Tax Tit., 661-2.)

M. T. C. Williams, for Respondent.

I. The acknowledgment was in form. (2 Seld. 422; Thurman vs. Cameron, 24 Wend., 87; 5 Smith, [N. Y.] 279; 1 Wend., 406; 1 Comst., 77; 41 N. Y., 402; 20 Ill., 402.)

II. The fifth instruction given by the court for plaintiff is proper. Actual occupancy by the rightful owner of part of the and, is constructive possession of the whole, unless he is disseized by actual occupation. (Hall vs. Powell, 4 Serg. & R., 465; Schultz vs. Lindell, 30 Mo., 317; Cottle vs. Snyder, 10 Mo., 770; McDonald vs. Snyder, 27 Mo., 405; Johnson vs. Prewitt, 32 Mo., 553; Crispin vs. Hannavan, 50 Mo., 545; Ang. Lim., § 410; Ad. Ej., 4 ed., 55-6, and cases cited.)

III. The eighth instruction given for plaintiff is correct law. The effect of an entry on land by the legal owner animo clamandi, is to restore to him the seizin and possession. (3 Bl. Com., 175; 1 Salk., 246; Altemas vs. Campbell, 9 Watts, 28; 2 Cr. Dig., 501; Robinson vs. Sweet, 2 Greenl. Rep., 316; Ang. Lim., § 378; Holtzapple vs. Phillibaum, 4 Wash. C. C., 356.)

Such entry will avoid the statute of limitations. (Gree vs. Rolle & Newell, 1 Ld. Raym., 716; Hayward vs. Kinsey, 12 Mod., 573; Ford vs. Grey, 1 Salk., 286; S. C., 6 Mod., 44; Goodright vs. Carter, Dougl., 486; Bull. N. P., 102, A.; Vin. Abr. Tit., "Entry"; Com. Dig. Tit., "Claim;" Bac. Abr. Tit. "Limitations;" Till. Ad. Ej. C., 4, p. 103.)

The Pennsylvania statute of 1785, of which ours is a copy, has been repeatedly construed, and under the decisions

relating thereto, an entry has always been held to avoid the statute. (Alternas vs. Campbell, supra; Alternus vs. Long, 4 Barr, 254; Hinman vs. Cranmer, 9 Barr, 40; Ingersoll vs. Lewis, 1 Jones, 212; Miller vs. Shaw, 7 Serg. & R., 129; Hood vs. Hood, 1 Casey, 417; Hoopes vs. Garver, 3 Harris, 517; Carlisle vs. Stitler, 1 Penn., 8; Holtzapple vs. Philli baum, supra; McCombs vs. Rowan, 59 Penn. St., 418; Doug las vs. Lucas, 63 Penn. St., 12.) And by the act of April, 1859, (1 Pamph. Laws, 603) the provisions of 4 Anne, similar to the 2nd section of our Limitation act, requiring suit to be brought within one year after entry, are made a part of the limitation Laws of that State:

Appellant may claim, however, that the statute only ap plies where there has been an actual ouster or disseizin in the strict common law sense of the term, by an intruder or wrong doer, and not where one takes possession of vacant land under claim and color of title.

WAGNER, Judge, delivered the opinion of the court.

This was an action of ejectment to recover a quarter section of land within the military bounty tract.

The plaintiff proved title by a regular chain from the patentee of the government, and the defendant relied on the statute of limitations.

On the trial the plaintiff introduced evidence tending to show that on the morning of the 26th of April, 1869, he went on the land in company with another person for the purpose of leasing the same to him; that he went around it and found the corners, and stepped off forty acres and threw up at the corners small mounds. He did not succeed in consummating the lease, and whilst he was on the land, defendant and his teams came upon it and were ordered off by plaintiff. He told defendant that he owned the land and was there to take possession and forbid the defendant doing any work upon it.

Defendant claimed that his lessor, one Lombard, owned the land and forbade plaintiff improving it. Defendant's teams went to work plowing on the lands and some of his hands

built a rail pen on one side of it. Plaintiff then had some plowing done on another piece of the land and employed an agent to attend to it for him, and left for his home in New York. On the 22nd day of June, 1871, he returned and entered upon the land. He found that defendant had ten or twelve acres inclosed on the east side, and that his hired men were plowing about four acres outside of the enclosure and adjoining it. He ordered them off and told them that he owned the land. Defendant's improvements were on the east side of the tract, and plaintiff's were on the west side.

Defendant read in evidence as color of title a deed from one Turner to Lombard for the land in question dated April 16th, 1869, for the consideration as therein stated, of one hundred and fifty dollars. He then gave evidence in reference to his possession.

The cause was tried before the court sitting as a jury, and a judgment was given for the plaintiff.

The court gave four charges or requests for the plaintiff which will be noticed.

The one numbered four in the series, declared that "the plaintiff having the legal title, the legal seizin and possession followed the title; and that the defendant setting up an adverse possession against such legal seizin and possession, must show, by evidence satisfactory to the court, that he, or those under whom he claims, have had a visible, notorious and continuous adverse possession of the land in controversy, under claim of right, and color of title thereto, during the period limited by the statute of limitations, before the commencement of this suit, otherwise the statute of limitations is no bar or defence against such legal seizin and possession."

The fifth request was that "if the court find from the evidence, that the plaintiff by himself, his agent or tenant, was in the actual possession of a part of the premises in controversy, as the legal owner of the same, within and during the time limited for the commencement of this suit, then the plaintiff had the legal possession of the whole of said premises, and could only be dispossessed thereof by actual ouster; that the

defendant having entered upon said premises, not having the legal title thereto, and occupied and cultivated a part of the same could only have possession of the part, so actually occupied and cultivated by him; that this adverse possession is to be taken strictly, and could not be made out by inference, but only by clear and positive proof; that it devolves upon the defendant to show by evidence satisfactory to the court, the character and extent of his actual possession; that such actual possession must have been open and uninterrupted, peaceable and continuous, for the whole time, next before the commencement of this action, limited by the statute of limitations, and that the plaintiff is entitled to recover all that part of the tract in controversy not so actually occupied by the defendant during the whole time limited by the statute of limitations prior to the commencement of this suit."

The sixth request declares that "to constitute adverse possession, so as to bar a recovery by the rightful owner, the party setting up such possession, must, in making his entry upon the land, and in acquiring such possession, act in good faith, under claim of right and color of the title thereto; and if the court find from the evidence, that the defendant knew when he entered upon the land that he had no legal title thereto, but knew it to be Bradley's land, and knew that the plaintiff was in the neighborhood for the purpose of taking possession and looking after the land; that when the defendant made his entry he found the plaintiff upon the land, claiming ownership and asserting title; that he did his plowing and built his rail pen for the purpose of preventing plaintiff from taking or acquiring possession of the premises, knowing him to be the rightful owner, then such possession, so acquired, will not serve the purpose of a foundation for an adverse possession, so as to bar the right of this plaintiff to recover."

The eighth declaration was that "if the court find from the evidence, that the plaintiff in June, 1871, as the legal owner of the land in controversy, peaceably and openly entered into and upon the same claiming to be such owner and intending to take possession of the same; that he made such

claim of ownership upon the land, and forbade the tenant of the defendant, or his servant, who was the only person found upon the land, from doing anything further upon the land, or making any further improvements thereon, then such entry, so made, put the plaintiff, for the time he was upon the land, in the actual possession of the premises; and if such entry was followed by the commencement of this action within one year after such entry was made, then such entry was sufficient and valid as a claim, to avoid the operation of the statute of limitations and the plaintiff must recover."

For the defendant the court declared the law to be; that the possession under color of title of a part of a tract or lot of land, in the name of the whole tract claimed, and exercising, during the time of such possession, the usual acts of ownership over the whole tract claimed, is deemed a possession of the whole tract.

The following declaration asked by the defendant was refused.

"If the defendant as the tenant of Lombard, under claim and color of title to the land in question, went into possession of a part of the same, in April, 1869, and for two years next ensuing, was and remained in the open, notorious and continuous adverse possession thereof, claiming the same for his landlord, Lombard, then the plaintiff's right of action is barred; and no entry will be sufficient or valid as a claim, unless made within the time in which an action may be brought for the recovery of such land, or the possession thereof; and if the plaintiff made an entry upon the land in question after the defendant had been in the open, notorious and continuous adverse possession of the same for more than two years, then such entry was not sufficient or valid as a claim."

An objection was raised to the introduction of one of plaintiff's deeds in evidence, on the ground that it was not acknowledged in conformity with the law of the State of New York, where the acknowledgment was taken, or in accordance with the provisions of the statute of this State. The acknowledgment was taken before a justice of the peace in Delaware Coun-

ty, and is in all things in due form except that the certificate does not state that he took it in the town for which he was officially acting, the law giving justices of the peace, power to take acknowledgments in the towns in which they resided. But we think the objection is not tenable. Where a conveyance is acknowledged before an officer authorized to take such acknowledgment, within the limits of his jurisdiction, it will be presumed that such acknowledgment was actually taken within such limits. (The People vs. Snyder, 41 N. Y., 397; Carpenter vs. Dexter, 8 Wall., 513.)

The fourth declaration, above alluded to in the plaintiff's series, states the law with substantial correctness and is sufficiently clear. There is no doubt about the proposition, that where a person has the legal title, the legal seizin and possession follow the title; and any one setting up or 'claiming under an adverse possession, must show that he or those under whom he claims, have had open, notorious and continuous adverse possession under claim of right or color of title for the

period limited by the statute.

The fifth instruction is also unobjectionable. Where the legal owner is in the actual possession of a part of the land of which he has the fee, the law invests him with the possession of the whole; and he can only be dispossessed by actual ouster; and a person entering on the land, not having the legal title, will be restricted in his possession to the part actually occupied or cultivated. The adverse possession of a disseizor, or of one who enters without right and retains possession by wrong, cannot extend beyond the limits of his actual occupancy. (St. Louis vs. Gorman, 29 Mo., 593; Schultz vs. Lindell, 30 Mo., 310; DeGraw vs. Taylor, 37 Mo., 310.)

The Statute provides that the possession, under color of title, of a part of a tract or lot of land, in the name of the whole tract claimed, and exercising during the time of such possession the usual acts of ownership over the whole tract so claimed, shall be deemed a possession of the whole of such tract (2 Wagn. Stat. p. 917, § 5). But this

section only applies where there is no occupancy by the legal owner of any part, and the person having the color of title is in possession of a portion of the premises, and then, as the remainder is not held by the real owner, the law extends the possession over the whole tract. The court gave an instruction for the defendant in the very words of the statute, and that taken in connection with the fifth declaration for the plaintiff leaves no ground for complaint.

The 6th declaration requires qualification. Good faith may become an important element, in certain circumstances, in reference to defining the limits of the possession, and showing that the possession itself was not taken as a mere gambling speculation; but the general principle undoubtedly is, that it is sufficient that the possession of the land be under a claim of title to clothe it with the character of an adverse holding, and to give it efficacy as a defense, when of sufficient duration to be a bar. The requisites in order to constitute an actual possession are that there should be made an entry, so that there may be an ouster effected and an adverse possession begun, and that he who sets up the title, must go upon the lands with a palpable intent, to claim the possession as his own The intent to claim and possess the land is one of the qualities necessary to constitute a disseizin and to hold under an adverse possession. (Knowlton vs. Smith, 36 Mo., 507; 3 Washb. Real Prop. 125.)

The question now remaining arises out of the plaintiff's eighth request. The statute limiting the time in which recoveries must be had, for the possession of real estate, limits the period to ten years, except in cases of military bounty lands where the limitation is two years. (2 Wagn. Stat. p. 915, § 1.)

The second section of the limitation law provides, that "no entry upon any lands, tenements or hereditaments, shall be deemed valid as a claim, unless an action be commenced thereon within one year, after the making of such entry, and within ten years from the time when the right to make such entry descended or accrued." This section is the same as it

existed under the previous statute; and, as applicable to the limitations of ten years, it is meaningless and fails to provide any new or additional remedy. Whilst it declares that an action may be brought within one year after an entry is made, yet it abridges or limits the time to within ten years from the time when the right to make such entry descended or accrued. As the right to make the entry existed as soon as a cause of action arose in consequence of an adverse holding, the limitation is not in the least extended. The intention was doubtless different, but the statute is thus written.

The two years' limitation, in respect to military bounty lands, was first imported into the statute in the present revision, and in applying the second section to this class of claims, the latter part may be rejected. The question then is, when must the entry, to be valid and effectual, be made? The opinion of the court was, that the plaintiff had one year in which to make the entry after the two years had expired, or in other words, he might evade the bar of the statute and extend the time to three years, if he made the entry in time. When the statute has once run for the requisite time, it creates an estate, which cannot be divested by any act of the plaintiff. The entry to have any effect must be made with an intention to claim the property before the statutory period has expired; this causes a break in the continued adverse possession of the occupant, and extends the time for the plaintiff to bring his action. In the very able argument made by the plaintiff's counsel in this court, he has stated, that our law on this subject is the same as the law in Pennsylvania, and has cited cases to show that it is construed there as contended for by him, and as held by the court below. But an examination of the authorities shows that he is in error. In that State the period of limitation, required to bar an action for the recovery of real property, is twenty-one years. In the leading case of Altemas vs. Campbell, (9 Watts, 28) which is greatly relied on, Ch. J. Gibson in discussing the character and properties of an entry, uses the following language:

"In our act of 1785 is comprised the substance of 21 Jac. 1 C. 16, under which an entry has always had its common law properties; and these have been attributed to it, under our statute, by the ablest men in the profession. In 1803 when the statute was about to close its bar in rights of entry in existence at its enactment, the agent of the Penn family, under the direction of the late Edward Tilghman, caused entries to be made into the messuages and lots in York and Carlisle, for the preservation of the proprietary quit rents. Indeed the statute expressly recognizes the conservative properties of an entry alone, by treating it as alternative for an action. These properties, however, are purely technical and are not to be favored. An entry puts the owner, for a time, in actual possession; and, as that, in the case of a mixed occupancy, is referrable to him exclusively who has the right, it gives him, momentarily, the advantages of actual enjoyment; and, momentarily displacing the adverse possession of the occupant, it instantly undoes all that his intrusion had done towards the accomplishment of a title. Yet it must be perceived that this effect is subversive of the purpose of the statute, which is to compel parties to settle their controversies while the evidence of their rights is attainable, and to put a reasonable period to the evils of a contested ownership. By repeated entries within periods of twenty-one years a contest might be kept on foot interminably, or till the occupant's proofs had perished, with those who could establish them."

By this opinion it appears plainly enough that the entry, to have any effect, must be made within the twenty-one years—the duration prescribed to complete the bar. Any other interpretation is totally inadmissible, as when the full time of the statute has elapsed, the title is vested in the occupant and the right of action is gone, and whenever the right of action is barred, the right of entry is tolled. The court therefore should have refused plaintiff's eighth request, and given the one for the defendant that asserted the converse proposition.

The plaintiff makes the further point in this court that the

whole limitation law as printed in our statutes is invalid, because not passed by the necessary constitutional majority, and to establish this jact the journals of the legislature are referred to. But the question was not raised in the Circuit Court, and we do not think it can be made here for the first time. The statute declares that the printed journal of the Senate and House of Representatives of this State, and all public documents and reports therein contained, and all reports or documents printed by order of the State, or of either House of the General Assembly or purporting to be printed by authority thereof, shall be prima facie evidence to the same extent that duly authenticated copies of the originals would be. (Wagn. Stat., p. 591, § 81.) The statute simply makes the journals prima facie evidence of what they contain.

. When they are introduced in a cause they are liable to be rebutted by the opposite party by showing that they are incorrect, and that they are not in accordance with the original legislative rolls.

To allow them to be used here for the first time in a proceeding of this kind, would be to make them conclusive evidence, and deprive the other party of all opportunity for his protection. Therefore the point will not be considered in the case as now presented.

The judgment must be reversed and the cause remanded. The other judges concur.

JOHN P. LEWIS, Defendant in Error, vs. THOMAS COOMBS, Plaintiff in Error.

Execution—Death of defendant, between levy and sale, no notice being given
to sheriff or purchaser, does not avoid sale collaterally.—Where judgment is
obtained in a suit by attachment, and between the levy of execution and sale
defendant dies, his death, not being brought to the knowledge of the sheriff
or the purchaser, will not render the sale and deed thereunder nullities,
which may be, for that reason, impeached in a collateral proceeding.

Error to Atchison Circuit Court.

W. P. Hall, with Bennett Pike, for Plaintiff in Error.

The death of Tarleton, between the issue of the execution and the sale, did not render the sale void, but at most only voidable. (Tidd's Pr., 936; Cox vs. Wilson, 1 Monr. [Ky.], 95; McKinney vs. Scott, 1 Bibb., 155; Reardon vs. Searcy's Heirs, 2 Bibb., 202; McNair vs. Biddle, 8 Mo., 257; Voorhees vs. U. S. Bk., 10 Pet., 472; Jackson vs. DeLancy, 13 Johns., 535; Warder vs. Tainter, 4 Watts, 270; Coleman vs. McAnulty, 16 Mo., 173; Union Bk. vs. McWharters, 52 Mo., 34; 1 Blackf., 210; Wood vs. Morehouse, 1 Lansing, 405; Aycock vs. Harrison, 65 N. C., 8; 2 U. S. Dig., N. S., 286; Hay vs. Thomas, 56 N. Y., 522; Blair vs. Ship "Charles Carter," 4; Cr., 328; Cooper vs. Reynolds, 10 Wall., 308; Hardin vs. Lee, 51 Mo., 241; Paine vs. Mooreland, 15 O., 435.

Hitchcock, Lubke & Player, for Defendant in Error.

I. No administrator or public officer can sell and convey a good title to land, unless authorized to do so by express law. (Thatcher vs. Powell, 6 Wheat., 125.)

II. There is a vital distinction between process irregular and process anauthorized. A sale under the latter being wholly null and void, may be attacked collaterally. (Mitchell vs. St. Maxent, 4 Wall., 242; Erwin vs. Dundas, 4 How. [U. S.], 58; Ryan vs. Carr, 46 Mo., 486; Merchant's Bank vs. Evans, 51 Mo., 335; Strain vs. Murphy, 49 Mo., 341; Durette vs. Briggs, 47 Mo., 361; Hardin vs. McCanse, 53 Mo., 255; McClure vs. Logan, 59 Mo., 234; Higgins vs. Peltzer, 49 Mo., 155; Fithian vs. Monks, 43 Mo., 520; Smith vs. Cockrell, 6 Wall., 756; 1 Cow., 735; 3 Wils., 345; 3 Johns., 523; 2 Com. R., 702.)

1. Although in the case at bar the special execution was issued during the lifetime of Tarleton, his death intervening before levy and sale, rendered the sale a nullity under the laws of this State. The sheriff had no power to sell.

(a.) The questinn here at issue depends exclusively on the construction and effect of the statutes of this State, and the settled policy of this State. (Munday vs. Ryan, 18 Mo., 29; Carson vs. Walker, 16 Mo., 79.)

(b.) Gen. Stat., 1865, ch. 141, §§ 43-46, forbid such sale. Gen. Stat., 1865, 637, §§ 16, 22, also prohibit it. And by §§ 1, 11-21, ch, 123, Gen. Stat., 1865, it is provided that judgments shall be classified against the estate of the deceased defendant, and the lien of the judgment satisfied by the administrator from the sale by him of the realty charged with such lien.

(c.) The death of the debtor arrests at once the ordinary process of collection, whether ascertained by judgment or not. No execution can issue or, if issued, be enforced. The whole matter must go into probate. (Miller vs. Doan, 19 Mo., 650; Carson vs. Walker, 16 Mo., 68; Sweringen, vs. Eberius, 7 Mo., 422; Prewitt vs. Jewell, 9 Mo., 732; Kerr vs. Weimer, 40 Ill., 544.)

III. The defendant in error having title through the court of probate, must prevail in this cause.

Napton, Judge, delivered the opinion of the court.

This was an action of ejectment, to recover forty acres of land in Atchison county. The facts were, that this land, along with other lands, was attached in a suit by the Bank of Kentucky, against one Tarleton, whose title is not disputed, and that a special judgment in the attachment suit was rendered in the Atchison Circuit Court at the November term, 1866, upon publication; that execution issued on the judgment, and was delivered to the sheriff on the 14th of December, 1866; that the land in controversy was levied on April 10th, 1867, and sale made in May, 1867, and that one Thompson, from whom defendant bought, became the purchaser. It further appears that said Tarleton was alive when the execution issued, but died before the levy and sale. And the plaintiff bought the land at the sale made by an administrator of Tarleton, several years after; in regard to the regularity

of which levy, sale and deed by the sheriff, there is no controversy.

It was conceded that the death of Tarleton was unknown to the sheriff, and the purchaser, and that no proceeding in the court from which the writ issued, had occurred. And the only question in the case is whether this levy, sale and deed made after Tarleton's death, were nullities, and are so to be regarded in this ejectment.

Our attachment law makes ample provisions in regard to the enforcement of attachments, after the death of the defendant. The lien is not destroyed, nor is the action to be dismissed, but the action and proceedings are directed to be proceeded on to final judgment, as if the defendant were living. The executor or administrator is required to be made a party, and when there is no executor or administrator, the court is directed to appoint an attorney to represent the interests of the defendant.

Section 45 provides, that "if judgment shall be rendered in the attachment in favor of the plaintiff, as provided in the 43rd section, no execution shall issue thereon, requiring the sale of any property or effects attached, as belonging to the defendant; but all such property and effects shall be sold, and the proceeds thereof appropriated in the manner provided by law respecting administrators and executors."

Section 46 is, that "after the death of any defendant, no court or judge shall order, as above directed, the sale of any property or effects attached, as belonging to such decedent; but the same shall be sold and the proceeds thereof appropriated in the manner provided by law respecting administrators and executors."

Our law in regard to judgments and executions may also be quoted in this connexion. "Section 16 of the act relating to judgments, declares, that if any defendant die after his real estate shall have been seized in execution, the service thereof shall not be completed, but the sheriff shall return the execution together with the fact of the defendant's death, which shall be a sufficient indemnity to him for his failure to proceed."

And again, section 22: "No execution shall issue on any judgment or decree rendered against the testator or intestate in his lifetime, or against his executors or administrators after his death, which judgment or decree constitutes a demand against the estate of any testator or intestate, within the meaning of the statute respecting executors and administrators; but all such demands shall be classed and proceeded on in the court having probate jurisdiction, as required by said statute."

Executions against the property of dead persons have no doubt been prohibited in this State, since the act of 1827, and it has been—as is shown in the very elaborate and able argument of the counsel for defendant—the settled policy of our legislature to require a resort to the Probate Court to settle any controversies in regard to the estates of dead men.

But the validity of the levy and sale and deed in this case, is another question. There could be no question of the validity of this sale at common law. Our law does not allow an execution against a dead man's estate; but who is to take notice of his death, the heirs or the sheriff? The defendant may be in China or in Cuba, he may be dead or alive, when the execution is levied! Does our statute mean to require the sheriff to inform himself on this point?

There is no doubt that our statutes have since 1827, prohibited executions on the estates of dead men, and various provisions have been enacted to enable the representatives of the deceased to avoid such executions; but as to an execution against a man's property supposed to be alive, and of whose death the officers had no information, the question is different.

By the common law there could be no question of the validity of such a sale. That subject was examined by Judge Kennedy, in the case of Warder vs. Tainter, (4 Watts, 270) with an ability and thoroughness of investigation which need no commendation or repetition here; and this case was quoted by our court in Coleman vs. McAnulty, (16 Mo., 173) with approbation.

What is the sheriff to do in such cases? He is not informed of the death of the defendant; and he cannot return the fact that he is dead, as he is not advised of it. He must of course sell the land under the writ, and return the sale. The defendant is probably a non-resident. Whose business is it to bring to the court information of his death? Who would be most likely to know of this event?

The return of the sale is virtually a return that the defendant was alive, when the levy was made and when the sale took place. This return was unimpeachable, except in an action against the sheriff or other direct proceeding to set aside the sale. The representatives of the dead man could contradict the return, and their suggestion would have stopped the execution in a proceeding before the court from which the writ issued, as clearly appears from our law. But no representatives appear; there is nothing to show that the defendant is dead, when the execution is levied, or when the property is sold; the defendant may have been in China at that time. The property sold was duly attached according to law, and sold under such attachment; and the question in this case is, whether proof in the ejectment suit, that the defendant was dead at the time of the sale or levy shall defeat the title of the purchaser. If it could be thus impeached in a collateral proceeding, great injustice would result to the purchaser.

It may be conceded that a levy and sale of a dead man's estate, known to be such by the officer, is a nullity; but it does not follow that a sale of property under an attachment against a man not known to be dead, upon publication, can be treated as a nullity in a collateral proceeding, on the ground that the defendant was dead when the property was sold; and so it was conceded in Coleman vs. McAnulty.

That case, it is true, was one in which the plaintiff was dead, and no inference could be drawn that a judgment against a dead defendant could be sustained; but the judge delivering the opinion, adopts the reasoning of Mr. Justice Kennedy in the case in 4 Watts, which applies to defendants

as well as plaintiffs, and in the Union Bank vs. McWharters, the case is followed without hesitation and without discussion. (52 Mo., 35.)

We have been referred to the opinion of the Supreme Court of Texas, in the case of Conkrite vs. Hart & Co., 10 Tex., and we entirely concur in the opinion that the probate laws have provided here, as well as in Texas, for a transfer of all proceedings instituted against a defendant, upon his death, to the Probate Court; but we think it is a non sequitur from the premises that therefore a sale under an execution, made after the death of the defendant, in attachment or other proceedings in rem, is a nullity, and transfers no title. Such inference is against all the principles of common law, and would overthrow titles acquired fairly and under the strictest compliance with law.

In proceedings by attachment, or in foreclosure of mortgages, it may well happen that the defendant is a non-resident, or becomes such after service; and, whether he is alive or dead, is a fact with which the sheriff cannot be supposed to be acquainted, and of which he is not supposed to be cognizant. He may be in some remote part of the world, but the presumption is, that he is alive; and this presumption is indulged by the law in more important matters than sales under execution.

The sheriff's return, levy, sale and deed, all of which are made under a valid judgment and under a valid writ in this case, authorize the purchaser to presume that the party was alive when this writ was levied. Shall a representative of the defendant be allowed, ten years afterward, to set aside this sale and title under it, in a collateral action, on the ground that the defendant was dead a week or a month before the levy? No confidence could be placed in such proceedings, especially in regard to defendants attached as non-residents, if such a construction is to be placed on our statutes.

The jurisdiction of the court over the subject matter, is beyond dispute, and the judgment was in all respects regular, and the execution on it was altogether proper. But oc-

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enrrences, it is said, took place after the issue of the writ, which rendered its levy improper and illegal. The defendant in this case died in Texas, or it matters not where, but his death was unknown to the officer to whom the writ was directed, and to the purchaser at the sale. Does this fact paralyze the efficacy of the writ, and destroy all title acquired under its execution?

We refer to the opinion of Mr. Justice Kennedy, in Warder vs. Tainter, as a complete refutation of such deductions, both upon authority and principle; and there is nothing in our statutes to prevent the application of these well settled principles here.

The judgment is reversed: the other judges concur except Judge Vories, who had been of counsel.

Archibald L. Darby, Appellant, vs. William J. Stark, Respondent.

 Venue, change of—Application for at close of term.—An application for change of venue, left undisposed of at the end of the term, is simply continued, and may be taken up and passed on at the next term. A new application is unnecessary.

Appeal from Clay Circuit Court.

- A. W. Doniphan, E. H. Norton, and Samuel Hardwick, for Appellant, cited Freleigh vs. The State, 8 Mo., 606; Gale vs. Michel, 47 Mo., 326; State ex rel. Duncan vs. Price, 38 Mo., 382.
- J. E. Merryman and J. F. Harwood, for Respondent, cited Jenkins vs. Hill, 57 Mo., 122; Corpenny vs. Sedalia, 57 Mo., 88; Wagn. Stat., 1355; Perry vs. Roberts, 17 Mo., 36.

WAGNER, Judge, delivered the opinion of the court.

Upon the petition of the plaintiff, a temporary injunction was granted to restrain the defendant from cutting and tak-

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ing away timber from certain premises, the title to which was in litigation. On the last day of the term plaintiff made his application for a change of venue, on the ground that the judge was prejudiced against him. No action was taken upon this application, and the court adjourned till the next regular term.

At the succeeding term plaintiff called up his motion for a change of venue, and defendant interposed the objection that the same was filed at the last term of the court, and could not be heard at a subsequent term. This objection was sustained and the application denied, the court giving as a reason that it was filed at a previous term of the court, and not taken up till the next succeeding term. Thereupon, the court proceeded to dissolve the injunction and assess damages against the plaintiff.

There is no objection made that the application to the first term was irregular or out of time, but the decision way based apparently upon the ground that as it was not deter mined at that term, it was of no further effect, and that an the second term it was necessary to give a new notice, na upon an original proceeding. But this, we think, is a mistake. When the court adjourned, leaving the application pending and undecided, it was simply continued, and like all other questions in the cause, liable to the future action and decision of the court. At the next term, when it wis called up, it was a proceeding pending, and to be determined in the same manner as any other preliminary question. When the application was filed on the last day, the party was in court for that purpose, and the adjournment of the court, without taking any action upon the application, did not put him out of court, but simply operated as a postponement of the decision till another term.

The court, therefore, erred, and its judgment will be reversed and the cause remanded; all the judges concur.

Cheeney v. The Inhabitants of the Town of Brookfield.

C. C. Cheeney, Respondent, vs. The Inhabitants of the Town of Brookfield, Appellants.

1. Corporations, municipal—Trustees of—Debt for engraving scrip—Warrant issued for—Town not bound, when.—The trustees of a municipal corporation created under and controlled by the statute relating to towns and their incorporation, (Wagn. Stat., 1313) have no authority to contract a debt for engraving scrip to be issued by said trustees, nor can they render the town liable for the payment of a warrant issued in satisfaction of the debt. And although the warrant, if signed by the proper officer, prima facie imports validity, its issuance may be shown to be ultra vires.

Those who deal with the officers of a municipal corporation must ascertain, at their peril, that these agents are acting in the scope of their lawful powers.

Appeal from Linn Court of Common Pleas.

Ell Torrance, for Appellants.

The trustees, in contracting the debt and in issuing the warrant, acted without any authority, and the corporation is not estopped after the issue of the warrant, to set up the defense of ultra vires. (Dill. Munc. Corp., § 412; Leavenworth vs. Rankin, 2 Kans., 358; Leavenworth vs. Norton, 1 Kans., 432; Loker vs. Brookline, 13 Pick., 348.)

W. H. Brownlee, for Respondent.

Although the town may have had no right and may have been prohibited from circulating small bills, yet the town is bound for printing and engraving. (Ang. Ames Corp., 8 ed., 271; 5 B. Mon., 130; Alleghany City vs. McClurkan, 14 Penn. St., 81.)

Sherwood, Judge, delivered the opinion of the court.

The question presented by the record before us is: Whether the trustees of a municipal corporation, incorporated under the general laws of this State, and possessing no power, and subject to no liabilities except such as are imposed and conferred by the statute, relating to towns and their incorporation, (Wagn. Stat., 1313) can render the corporation which they represent liable for the payment of a warrant drawn on the treasurer of the town, having been issued by order of the

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trustees, to pay a debt contracted by them, with a bank note and engraving company, to engrave and print on bank note paper notes payable to bearer, to be put into circulation as money by such trustees in their official capacity.

An examination of the statute referred to will conclusively show that no such powers as those attempted to be exercised in the case at bar, were conferred by law on the trustees. Their act, therefore, in contracting the debt and in issuing the warrant in suit, was wholly unauthorized and illegal. And although a warrant signed by the proper officer, prima facie imports validity, and a subsisting cause of action. (Dill. Mun. Corp., § 411) yet it is always competent for a municipal corporation, as was done in the court below, even after the issuance of a warrant upon its treasury, to set up the defense of ultra vires. (Id., §§ 381, 412, 749; Marsh vs. Fulton Co., 10 Wall., 676; Thomas vs. Richmond, 12 Wall., 349; Loker vs. Brookline, 13 Pick., 353; Clark vs. City of Des Moines, 19 Ia., 199, and cases cited; Brady vs. The Mayor, &c., of the city of New York, 20 N. Y., 312.)

The authorities above cited, as well as others too numerous for citation, assert in all its broadness the above mentioned doctrine, and its applicability to cases of this character. Those who deal with the officers of a corporation must ascertain, at their peril, what they will indeed be conclusively presumed to know, that these public agents are acting strictly within the sphere limited and prescribed by law, and outside of which they are utterly powerless to act.

Nothing here asserted has any reference to a certain class of cases-wherein the doctrine of "implied municipal liability," may be successfully invoked, as is undeniably true in some instances totally dissimilar, however, from the present one. (Dill. Mun. Corp., § 384, and cases cited.)

But the plaintiff has urged upon our attention two cases as fully authorizing the recovery which he obtained in the court below; and we will briefly advert to them.

The case of Alleghany City vs. McClurkan, (14 Penn. St., 81) is chiefly based on the proper construction to be placed

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upon a statute of Pennsylvania adopted in the year 1828, the first section of which prohibited corporations from issuing contracts or notes of the kind embraced in the action, and the second section imposed a penalty for so doing. But the third section of the act provided expressly that such notes or bills should not be void, and allowed a recovery thereon, with 20 per cent. interest as a penalty from date of issue; so that that case, although employing much loose language, was correctly decided, and affords no support for the position assomed by plaintiffs. The other case upon which he relies, is that of Underwood vs. The Newport Lyceum (5 B. Mon., 130). There it is broadly decided, that notwithstanding the exporation was, by the act of 1834, expressly inhibited from the exercise of banking powers, and notwithstanding the offieers of the corporation in the exercise of such powers, would full under the penal denunciations of the act of 1812, yet a reenvery might be had against a corporation for services rendered in engraving bills, checks and notes, although it might he presumed they were to be used and put into circulation in violation of the law, and in furtherance of an illegal pur-

This decision, it must be conceded, is directly in point in two of plaintiff, but so far as our researches have extended it stands alone, appears to have been made without any eximination or citation of adjudicated cases, is certainly at variance with both reason and authority, ignoring, as it evidently does, that most salutary doctrine which imperatively forbids the exercise of statutory powers beyond the limits originally assigned them by the legislative will, and refuses, when the narrow boundary is transcended, to lend a legal sanction to acts which on their very face bear the broad stamp of illegality.

Judgment reversed and cause remanded; all the judges concur.

DeGraw v. Prior.

Hamilton DeGraw, Respondent, vs. William Prior, Appellant.

- 1. Forcible entry and detainer—What questions may be passed on by the jury.— In suit of forcible entry and detainer the question what acts constitute possession is for the court, and whether they have been done is for the jury. And the court may, under proper instructions, leave the whole question to the jury where there is any evidence tending to show a bona fide prior possession by plaintiff.
- 2. Forcible entry and detainer—Possession of plaintiff must be bona fide and not a mere sham—Instances.—Possession of land to authorize an action of forcible entry and detainer must be bona fide and not a sham. Thus, where plaintiff was driven off by stress of weather and returned when permitted, such temporary absence will not defeat his action. On the other hand, where he attempted to get possession in order to throw the onus of a suit in ejectment on another, by simply going on the land and plowing for half a day or so and then absenting himself for six months or more, one entering on the land at that time would have a right to presume that his project had been abandoned.

Appeal from Carroll Circuit Court.

Instructions Nos. 6 and 7 referred to by the court were as follows:

VI. The court instructs the jury that there is no evidence tending to show that the Websters ever took possession of the land in question under the contract for a deed which was read in evidence; and that in the absence of such evidence the said contract for a deed cannot affect any right to recover which plaintiff may have under the evidence in this case.

VII. If the witness Hill, under the agreement which has been read in evidence, went upon the land in question in July, 1868, and plowed five-eighths of an acre, or thereabouts, for the plaintiff, and with the view to take possession of the same for plaintiff, and if he temporarily quit the plowing for any reason, intending to continue the same, and if in the meantime and in the fall of the same year, defendant had the house built thereon, then such facts are not of themselves sufficient to prove an abandonment by the plaintiff of his possession, and if defendant relies upon such abandonment he must prove the same by a preponderance of evidence.

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Roy & Roy, for Appellant.

I. While the law protects those who honestly and in good faith take the actual possession of and make real improvements on land, it will refuse protection to mere gamblers in land, who cause to be instituted sham proceedings, possession or improvements. (Crispen vs. Hannavan, 50 Mo., 536, 548; Chapman vs. Templeton, 53 Mo., 463.)

L. H. Waters, for Respondent.

I. It was not necessary that plaintiff should remain upon the land, or that he should keep any one there. If his acts done upon the land indicated an intention to hold possession in himself, he could recover. (Bartlett vs. Draper, 23 Mo., 107; Humphrey vs. Jones, 3 Monr., 261; Chiles vs. Stevens, Y. A. K. Marsh., 333; see, also, Powell vs. Davis, 54 Mo., 15; Langworthy vs. Meyer, 4 Iowa, 18; Miller vs. Northrup, 14 Mo., 397.) Whether the defendant was in the actual possession at the commencement of this suit was a question of fact for the jury. (DeGraw vs. Prior, 53 Mo., 313.)

Napron, Judge, delivered the opinion of the court.

In these actions for forcible entry and detainer, the facts of one cases decided have been so variant, that it is difficult to delace any general principle or rule from them.

What acts constitute possession is certainly for the court to recide—whether the acts have been done is for the jury; and the court may, with propriety, leave the whole matter to the jury, under proper instructions, where there is any evidence tending to show a bona fide prior possession.

Heretofore the court has gone very far in this direction; but if we go back to the case of Kincaid vs. Logue, (7 M. R., 167) it would be very plain that the plaintiff in this case had no possession of the land when the defendant made his farm of 70 acres on it.

In Kincaid vs. Logue, the plaintiff ran a worm fence round 200 or more acres, laid upon a worm with one, two,

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three, or sometimes four rails; and the idea of such an enclosure being called a fence was ridiculed by Judge Tompkins.

Here the plaintiff employed a man to plough a part of a day and break up in the half section some 1½ acres, in the quarter now in controversy, some § of an acre, in the summer of 1868. The agent of plaintiff then left, and in the fall of 1868, the defendant had built on the land a cabin, either as agent of his son who had a deed for the land, or on his own account; and in the spring of 1869, enclosed and cultivated 70 acres. Neither the plaintiff nor any one for him ever had any further connexion with the land after the month of July, 1868, when he broke up, or ran a plough over, § of an acre; and this ploughing was held by the jury, under instructiona from the court, as a possession of the land. It does not appear that either party had any title, though both claimed under deeds.

The first and second instructions asked by the defendant should have been given or the substance of them. They are merely declarations of the law, as stated by Judge Bliss in Crispen vs. Hannavan (50 Mo., 536), and instructed the jury that the possession, to enable a party to maintain forcible entry and detainer, must be bona fide, and not a mere sham.

There is no doubt of the correctness of the rule laid down by Judge Adams. when the case was here before, that "a temporary absence does not deprive the possessor of his right." (53 Mo., 316.) But in this case the absence was not temporary—it was final.

There was nothing to hinder plaintiff from going on with his work in the fall, so far as appears, yet nothing further was done until this suit was brought, after defendant had made a large farm on the land, either for himself or his son.

It is difficult to maintain that this action was properly brought against the defendant. He bought the land, it is true, but took the title to one of his sons. He lived in another county, and although he paid for the land and advanced all the money to make the improvement, it was all done for his son, in whose name the land was bought. He, himself, was

seldom on the land. He had another son, a negro man and another person, named Thompson, in possession. This point is not, however, material, and really has nothing to do with the merits of the case.

The 6th instruction given for the plaintiff was wrong. It leaves the question of possession entirely to the jury.

The 7th instruction properly instructs the jury, that certain facts constituted possession and if the facts had been so stated as not to mislead, and accompanied with the counter instructions asked by the defendant, the verdict would have been allowed to stand. If the plaintiff merely desisted from plowing by reason of bad weather, and returned again when the weather allowed, and was driven off on his return by threats or force (as he intimates in his evidence), he was entitled to his action. But where a man attempts to get a possession, in order to throw the onus of an action of ejectment on another, by merely going on the land and ploughing for half a day or so, and the subsequent improvement is not made until six months thereafter, such possession has very much the appearance of being merely nominal and the subsequent trespasser has a right to suppose, if he observes the plough marks at all, that the project has been abandoned. This however is a question for the jury.

The judgment is reversed and the case remanded; the other judges concur, except Judge Sherwood, who is absent.

WILLIAM BRADLEY, Respondent, vs. Charles West, Appellant.

Practice, civil—Instructions—Failure to give additional ones no ground of reversal, when.—Where instructions given, correctly explain the law and cover all the issues in the case, the refusal of additional instructions cannot be assigned for error.

2. Forcible entry and detainer—Possession by owner, what necessary to sustain a verdict.—The possession of uncultivated land necessary to support an action of forcible entry and detainer on behalf of the owner, does not require the constant presence of plaintiff either in person or by agent. Any acts done by him on the premises showing an intention to hold possession, for the purpose of cultivation and improvement, will be sufficient. Thus where plaintiff traced out the boundaries, threw up mounds at the corners of part of the land, and when defendant came on the ground, ordered him off with the assertion that the land belonged to plaintiff, proof of these facts would support a verdict.

Appeal from Carroll Circuit Court.

L. H. Waters, for Appellant.

Plaintiff in this action must do some act furnishing visible tokens of occupancy. Temporary presence of itself is insufficient. (Miller vs. Northrup, 49 Mo., 398; DeGraw vs. Prior, 53 Mo., 313; Gittings vs. Moale, 21 Md., 135; Stewart vs. Wilson, 1 A. K. Marsh., 255; see also McCartney vs. McMullen, 38 Ill., 241; McCartney's Adm'x vs. Alderson, 45 Mo., 39; Harris vs. Turner, 46 Mo., 438; Miller vs. Shaw, 7 Serg. & R., 129; People vs. Nelson, 13 Johns., 340.) In this case plaintiff merely went on the land, paced off forty acres in the south-west corner with his cane, and made at each corner a mound as large as a man's head, which two days after were not sufficient to locate the land intended to be secured.

M. T. C. Williams, for Respondent.

The evidence of plaintiff's possession was sufficient. (Bartlett vs. Draper, 23 Mo., 409; Schmeiding vs. Ewing, 57 Mo., 79.)

I. Actual possession of lands may be either pedis possessione or a substantial enclosure. (2 Bouv. Ins., § 2193, p. 482.) There may be possession, in fact, of unimproved and uncultivated land. (Wall vs. Nelson, 3 Litt. [Ky.], 398; Langworthy vs. Myers, 4 Iowa, 18; Allcott vs. Pearl, 11 Pet. [U. S.], 412; Powell vs. Davis, 54 Mo., 315.) The entry upon lands with the intention of clearing it and fitting it for cultivation, is such an entry as the jury may be authorized to infer actual possession from. (Humphrey vs. Jones, 3 Mon.

[Ky.], 261.) A different doctrine would place the owners of wild and uncultivated lands at the mercy of every intruder and trespasser who might choose to settle upon it. (Miller vs. Northrup, 49 Mo., 400.)

WAGNER, Judge, delivered the opinion of the court.

This was an action of forcible entry and detainer, for a strip of land in Carroll county, and the instructions of the court constitute the only matters of inquiry.

The trial was before the court sitting as a jury, and the first declaration was to the effect that if plaintiff was at any time within three years next before the commencement of the action in peaceable possession of the premises, and whilst so in possession, and without his consent and against his will, defendant took possession, then the finding should be for the plaintiff, and that it was not necessary, to constitute possession of the premises, that the plaintiff should stand upon a part of the premises or keep his tenant there, but that any act done by him thereon, indicating an intention to hold possession for himself was sufficient to give him actual possession.

The second declaration was that if the plaintiff actually and peaceably entered upon the quarter section, which included the land in controversy, under a deed therefor to himself, claiming to own the same, and the land was vacant and unimproved, and the entry was with the intention of claiming and holding the possession, and he did any act thereon indicating an intention to hold and possess the same, then such entry was sufficient to give him the actual possession of the whole tract.

The third instruction declared that if plaintiff paid taxes on the land for a certain number of years, and afterwards made actual entry under a deed and claim of ownership, with the intention of taking possession thereof, the land being vacant and unoccupied, for the purpose of improvement and cultivation, and ascertained the lines and boundaries, and paced off or measured a portion of the tract for purposes of cultivation, and indicated the boundaries thereof, and did any other act indicating his intention to follow up such possession by

cultivation or improvement; and while upon the premises actually and openly claimed the ownership and possession, then there should be a finding that the plaintiff was in peaceable possession.

The fourth instruction announced the proposition that if, while the plaintiff was in the peaceable possession of the premises, the defendant, by himself, his agents or servants, entered upon the premises without the consent and against the will of the plaintiff, and commenced to make or made any improvements, or cultivated thereon, against the express commands of plaintiff while upon said land and in actual possession thereof, the defendant was guilty of a forcible entry and unlawful de tainer.

The fifth instruction had been subtantially given before and needs no consideration.

For the defendant the court declared the law to be:

1st. That before the plaintiff could recover, it was necessary to show by a preponderance of evidence that he was lawfully possessed of the premises sought to be recovered, and that defendant, by force of strong hands, or by threats or other circumstances of terror, entered upon the possession and furned the plaintiff out, or unlawfully and wrongfully entered thereon.

2nd. If the land in question was vacant and unoccupied, and the plaintiff was the owner thereof at the time of defendant's entry, plaintiff's constructive seizin would not support the action. It must be proven that plaintiff was in the actual, visible possession of some part of the tract before he could recover.

3rd. To entitle the plaintiff to recover, in this case, it must appear from the evidence that at the time defendant entered, plaintiff had entered upon the land, and done such acts as would amount to open and visible *indicia* of possession. The acts done must be of such character as would indicate, to parties passing the land, an intention to hold the possession thereof in himself.

The court refused there declarations offered by the defendant, but if those already given correctly explained the law, and covered all the issues presented in the case, the refusal to give additional instructions cannot be assigned for error. However, from an examination of the refused instructions we think they are objectionable and liable to criticism.

The instructions, taken together, presented the law fairly and are in entire harmony with the previous decisions of this court. The land was uncultivated and unimproved, and of such land there may be such a possession as will sustain an action of forcible entry and detainer. The owner is not bound to be always on the land, either by himself or his agent, for the sake of actual manual occupation, and for the purpose of marning off intruders or trespassers. If an entry is made with the intention of retaining the permanent possession, and clearing and improving the land, and fitting it for cultivation, it may be sufficient, and authorize the inference that the possession is actual. Any act done on the premises, by the owner, indicating an intention to hold possession thereof to himself, will be sufficient to give him the actual possession.

The evidence showed that the plaintiff entered upon the lind, for the purpose of cultivation and improvement, that he traced out the boundaries, and threw up mounds at the corrers of a part of it, and when the defendant came upon it he ordered him off, and informed him that the land was his. This was such evidence as would support a verdict, and prevent our interference. (Bartlett vs. Draper, 23 Mo., 407; Prewitt vs. Burnett, 46 Mo., 372; Miller vs. Northrup, 49 Mo., 397; Powell vs. Davis, 54 Mo., 315; DeGraw vs. Prior, 53 Mo., 313.)

But in addition to the general principles laid down in the plaintiff's declarations, which are in accordance with the law as settled by this court, the defendant's instructions made it necessary, before there could be a verdict for the plaintiff, to find: that defendant entered upon the possession and turned plaintiff out, or that the entry was unlawful and wrongful;

that the plaintiff was in the actual, visible possession of the land, and that at the time defendant entered, plaintiff had entered upon the land, and done such acts on the same as would amount to open and visible *indicia* of possession, and that it was necessary that such acts should have been of such a character as would indicate an intention, to parties passing the land, to hold the possession of the same.

It seems to me that these declarations were as favorable as the defendant could demand, and that all the instructions given in the case were so manifestly just, that there is no reasonable ground for complaint.

The judgment should be affirmed; all the judges concur.

THE STATE OF MISSOURI, ex rel. THOMAS W. JOHNSON and HARRIET JOHNSON, Respondent, vs. RICE A. DUNN, JOSEPH WILLIAMS and LEMUEL DUNN, Appellants.

- Practice, civil—Depositions—Objections to should be made, when.—After parting
 have been induced to go to trial with the belief that depositions will be ad
 mitted in evidence, it is too late to raise objections to irregularities in thei
 taking—such as that the notice was insufficient.
- 2. Replevin—Verdict—Failure to assess the value of property—Judgment order ing return—Party entitled to receive property, when.—A judgment for the return of property in a replevin suit, under a verdict which fails to find the value of the property to be returned, is erroneous, but in the absence of any appeal therefrom is not void; and in such case, if the party recovering elects to have the property returned, and demands the same, he is entitled to receive it.
- 3. Replevin—Indemnifying bond—Solvency of sureties—Damages.—Where only one of the sureties on the indemnifying bond in a replevin suit is a resident householder, the instrument may be technically defective, but if he be good for the amount of the bond, only nominal damages can be obtained for the breach.
- Replevin—Indemnifying bond—Seal.—An indemnifying bond in a replevin suit need not be under seal.

Appeal from Caldwell Circuit Court.

Crosby Johnson, for Appellants.

I. The depositions should have been admitted. (Tindall vs. Johnson, 4 Mo., 113; Cabanne vs. Walker, 31 Mo., 274; Delventhal vs. Jones, 53 Mo., 460; Parsons vs. Parsons, 48 Mo., 405.)

II. The court was bound to enter up the judgment conformably to the verdict. (Bartling vs. Jamison, 44 Mo., 141; 8 Mo., 45; 27 Mo., 396; Emmons vs. Dow, 2 Wis., 322.)

The court could not award the return of the property. (Ford vs. Ford, 3 Wis., 399; Heeron vs. Beckwith, 1 Wis., 17; 22 Wis., 568; 30 Wis., 200; 13 Wis., 17; Tardy vs. Howard, 12 Ind., 404.)

III. One of the sureties being responsible, only nominal damages could be recovered. (Lord vs. Bicknell, 35 Me., 53; Glezen vs. Rood, 2 Metc., 490; Gallarati vs. Orzer, 27 N. Y., 324.)

Hoskinson & McLaughlin, for Respondent.

The bond was insufficient and the sureties thereon are liable. (See State vs. Boisliniere, 40 Mo., 568.)

Vories, Judge, delivered the opinion of the court.

This action was brought to recover damages for the breach of the official bond of a constable.

Rice A. Dunn was elected constable of Kingston township, Caldwell county, Missouri, and entered upon his duties as such, the defendants, Lemuel Dunn and Joseph Williams, becoming sureties on his bond as such constable. The bond is in the usual form. The breaches of the bond averred in the plaintiff's petition are as follows: that the Grover & Baker Sewing Machine Company, on the 18th day of November, 1870, instituted a suit before a justice of the peace, under the statute for the "Claim and Delivery of Personal Property" in justices courts; (2 Wagn. Stat., 817) that the suit was commenced by said company to recover from

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the relators in this action the possession of a sewing machine. of the Grover & Baker pattern, which, it is charged, belonged to said company, and was detained by relators. An order of delivery was issued by the justice and placed in the hands of the defendant Rice A. Dunn, as constable as aforesaid, to be by him executed as the law directs. It is alleged that said constable did, on or about the 18th day of November, 1870, proceed to execute said order for the delivery of the possession of said sewing machine, and did then and there take the said machine from the possession of the relators, and unlawfully deliver the same to the said Grover & Baker Sewing Machine Company, without first requiring said company to deliver to him, the said constable, a bond for the return of said property upon the conditions required by law; that he failed and refused to take any bond at all in said cause; that the instrument taken by him was not under seal; that the sureties thereon were not at said time, nor have they since become, resident householders or freeholders within said county of Caldwell; that after the delivery of said property to said company such further proceedings were had in said cause, in said justice's court that on the 16th day of January, 1871, the relators recovered in said cause a judgment to the effect that said sewing machine company was required to return to said Thomas and Harriet Johnson said sewing machine, and that said relators at the time elected to take said property in place of the assessed value thereof as assessed in said judgment; that the said sewing machine company failed and refused to deliver said machine to the relators, as required by said judgment, and still refuse so to do; that in consequence of the failure of said constable to take the bond required by law from the said sewing machine company to indemnify relators, they are left wholly without remedy except by this action; that the relators were the owners of said machine at the time of the taking and delivery thereof to said company by said constable as aforesaid; that the same was worth seventy dollars; that by reason of the said taking, etc., relators are damaged in the sum of sixty dollars, etc.

The defendants, in their answer, aver that relator Harriet Johnson is a married woman, the wife of her co-relator; that said defendant, Rice A. Dunn, did in conformity with the statute take a bond in said case, pending before the justice of the peace, for a sufficient amount to indemnify relators, which bond was taken in strict conformity to the law; that the sureties thereon were solvent, and such as are designated by the statute, etc.

The defendants fully denied all other material allegations stated in the petition. The plaintiff replied, denying the affirmative averments in the answer, except that relators were husband and wife.

The case was tried by the court, and judgment rendered for the plaintiff in the sum of forty dollars and costs.

The defendants filed a motion for a new trial, which being overraled by the court, they excepted and have appealed to this court.

During the trial of the case there were a great many objections made and exceptions saved by the respective parties, but it will not be material to a proper disposition of this case that we should notice any but a few of the most prominent ones.

The constable's bond, read in evidence, was in the usual form, and the bond taken by the constable, was in conformity to the sixth section of the act concerning the "Claim and Delivery of Personal Property" in justices' courts, and was not under seal. It was, however, shown that one of the sureties on the bond was not a resident, nor householder or freeholder of the county of Caldwell, as is required by the 8th section of the act before referred to. The evidence tended to prove that the other surety came within the provisions of the law, and was at the time sufficient and solvent.

A transcript of the proceedings before the justice of the peace in the action for the delivery of the sewing machine referred to and described in the plaintiff's petition, was read in evidence. The judgment rendered by said justice in said cause, was as follows: "January 16th, 1871.—The above

cause coming on to be heard, both parties being present and ready for trial, a venire being issued and returned with the following names, to-wit: * * * * six good and lawful men, who are duly sworn, and, after hearing the evidence, returned with the following verdict: 'We, the jury, find for the defendants and assess the damages at twenty-five cents;' it is therefore considered by the court that plaintiff return the property as taken to defendants, or that he and his sureties, Morton and Johnson, pay the said defendant — dollars at the discretion of defendants, and also pay double the damages assessed for the detention of said property, to-wit: the sum of fifty cents, and his costs in this suit, and that they have execution therefor."

The plaintiff offered evidence tending to prove that the machine in controversy was the property of relator T. W. Johnson, and that it was worth fifty-five dollars.

The defendants on their part introduced evidence which tended to prove that neither of the relators were the owners of the machine, in question before the justice.

It was also shown that, after the rendition of the judgment by the justice, the plaintiff in that case had paid off the judgment rendered for damages and costs, and that the relator T. W. Johnson had demanded of the constable and the agent of the Grover & Baker Sewing Machine Company a return of the machine replevied—which was never returned.

The court at the request of the plaintiff declared the law to be as follows:

"1st. The court declares the law to be that, if Rice A. Dunn, constable of Kingston township, Caldwell county, took from the possession of the relators the machine in question, without first requiring the Grover & Baker Sewing Machine Company to execute and deliver a bond, signed by two resident householders or freeholders of Caldwell county, to indemnify the relators in the action of replevin by the Grover & Baker Sewing Machine Company against the relators, before M. D. Northrup, a justice of the peace of Kingston township, in said county and State, then, and in that

event, the said Rice A. Dunn and his sureties on his official bond, as constable, are responsible for all damages relators sustained in consequence of the deficiency of said bond."

"2d. The measure of damages in this case is the value of relators' interest in the sewing machine and attachments at the time the same were taken from them."

These declarations of law were objected to by the defendants, and exceptions saved.

The defendant then asked the court to make some eighteen declarations of law; but as they involve but few principles of law it will only be necessary to notice a few of them.

One of the declarations of law so asked by the defendants was to the effect, "that if one of the sureties on the bond taken by Rice A. Dunn as constable in the replevin suit before justice Northrup, was a resident freeholder of Caldwell county, and was worth the sum of two hundred dollars over and above all just debts and exemptions; and if he had not yet removed from said county, or become insolvent, then the court will find for the plaintiff; but its damages will only be assessed at one cent."

Another of said declarations of law assumed that, if the bond taken in the replevin suit before the justice was in the form required by the statute, it would be valid and binding notwithstanding it was not executed under the seals of the parties thereto.

The first of these declarations of law on the part of the defendants was refused, and the last was given by the court, and exceptions were at the time saved.

In this court, it is first objected that the Circuit Court erred in excluding the deposition offered in evidence by the defendants on the trial of the cause. The deposition had been taken in the previous case prosecuted before justice Northup, for the recovery of the sewing machine, wherein the Grover & Baker Sewing Machine Company was plaintiff, and the relators in this case were defendants. The relators had notice of the time and place of taking the deposition, and it had been filed in this cause as a deposition to be read on the trial

at a term of the court previous to the one at which the trial took place. No motion had been made to suppress the deposition; but the objection was made to the reading of the same as evidence in the cause, on the ground that there was no sufficient notice given to the relators of the taking thereof, and on the ground that the parties to the action in which the deposition was taken were different from the parties in the present action. Without deciding that a motion to suppress would not have been properly sustained, for the objections raised to the deposition, if made in time, it may be said that it is too late to make such objections on the trial after the party has been induced to go to trial, with the belief that no such objections will be made. Such a practice would be unfair and lead to injustice. (Delventhal vs. Jones, 53 Mo., 460.) The deposition, however, excluded in this case only tended to prove to whom the sewing machine belonged, which was in controversy in the trial of replevin suit before the justice of the peace; and according to my view, had no applicability to the matters in issue in the present case, and although the evidence was excluded under the circumstances for a wrong reason, the defendants were not injured thereby, and the judgment would not be reversed for that reason.

It is next insisted that no return of the property could be required by the judgment of the justice under the verdict rendered by the jury in the justice's court. The verdict was for the defendants, assessing their damages at the sum of twenty-five cents. There is no finding in reference to the ownership of the property or the right of possession, or the value thereof. It is insisted that under such a verdict no judgment could be rendered by the justice for a return of the property, and that no recovery could be had against the constable and his sureties for the failure of the plaintiffs in that suit, to return the machine in conformity to the order wrongfully made by the justice.

There is no doubt but the judgment of the justice was erroneous. It was improper to render any judgment for a return of the property under a verdict which failed to find the

value of the property to be returned. The statute requires that such value shall be found so that an election may be made by the successful party, whether he will receive the damages or the property to be returned. (2 Wagn. Stat., 819, §§ 14. 15; Tardy vs. Howard, 12 Ind., 404; White vs. Van Houten, 51 Mo., 577; Appleton vs. Barrett, 22 Wis., 568.)

There is no doubt but that a judgment rendered on such a verdict, is erroneous and would be reversed on appeal; but the question is, is such a judgment absolutely void, when not appealed from? It seems to me that it is not void, but that in such case where no appeal is taken and the successful party elects to have a return of the property, and demands the same, he is entitled to receive it.

The declarations of law asked for by the plaintiff-it is next insisted-were wrongfully given by the court. So long as it appears that the bond, taken by the constable for the delivery of the property, was in the form required by the statute, and that one of the sureties was a resident freeholder of the county, with property sufficient to pay for all damages for a failure to re-deliver the property, where such re-delivery is required, the relators were not injured by the default of the constable. It is true there is a technical breach of the bond which may give the relators a right of recovery in such an amount as they have been damaged, as is stated in the first declaration of law as given by the court; but the court wrongfully declared in the second instruction that the measure of the damages was the value of the relators' interest in the property in controversy. The declaration of law asked for by defendants, to the effect, that, if there was one solvent surety on the bond, who was at the time a resident freeholder of the county, and who still remained solvent, against whom relators had a remedy, the damages to the relators would only be nominal, ought to have been given. The evidence in the case fully sustained the allegations that as to one of the sureties, the law had been complied with, and that he was still solvent and responsible. In such case there was only a technical breach of the bond which could do the relators no real

damage, and only nominal damages should have been recovered. At least the declaration of law should have been given. (Glezen vs. Rood, 2 Metc. [Mass.], 490), and it makes no difference in this case that the bond was not sealed with the seals of the parties. The form, set forth in the statute, is neither sealed nor does it purport to be sealed further than the word bond would import a seal.

The judgment will be reversed, and the cause remanded; the other judges concur.

Armstrong Beattle and Thomas B. Weakley, Respondents, vs. Egbert O. Hill, Appellant.

1. Practice, civil—Appeal from justice—Inserting names of members in lieu of firm name—Change in cause of action.—Where suit before a justice is brought in the name of a firm, the cause may be amended on appeal in the Circuit Court, by inserting the names, in full, of the members composing the firm. This is not the introduction of any new parties, and does not change the cause of action, within the meaning of the statute. (Wagn. Stat., 850, § 19.) [House vs. Duncan,—50 Mo., 453—commented on.]

Practice, civil—Instructions—May declare that certain evidence tends to prove
particular facts.—An instruction which tells the jury that they may consider
certain evidence as tending to prove a particular fact, but which makes no
comment as to its weight or effect, is not for that reason improper.

 Practice, civil—Weight of evidence.—It is not the province of the Supreme Court to weigh testimony in civil actions at law.

Appeal from Buchanan Circuit Court.

B. F. Loan, for Appellant.

The cause tried before the justice was a demand, in plaintiffs' favor, against Hill and Weakley. In the Circuit Court it was amended so as to be in favor of Beattie & Weakley, against Hill as sole debtor. This was such a change in the cause of action as the law prohibits. (Wagn Stat., 850, § 18; and see further Clark vs. Smith, 39 Mo., 499; Chouteau vs. Hewitt, 10 Mo., 131; Webb vs. Tweedie, 30 Mo., 488; Brashears vs. Strock, 46 Mo., 221; Elliott

vs. Clark, 18 N. H., 421; Dean vs. Jewell, Id., 340; Powers vs. Sutherland, 1 Duv. [Ky.] 151; Burbage vs. Squires, 3 Metc., [Ky.] 79; Lake vs. Moss, 11 Ill., 589; 13 Ill., 571; Maxey vs. Padfield, 1 Scam., [2 Ill.] 59; Henckler vs. County Court, of Monroe, ex rel., 27 Ill., 39; Gould vs. Gloss, 19 Barb., 179.)

Allen H. Vories, for Respondents.

The amendment was proper. (House vs. Duncan, 50 Mo., 453.)

WAGNER, Judge, delivered the opinion of the court.

This was a suit brought before a justice of the peace on a promissory note, given by defendant Hill to Weakley, and by him assigned to plaintiffs. The note purported on its face to be for two hundred and twenty-five dollars. In the justice's court plaintiff had judgment, and Hill appealed to the Circuit Court.

The suit was brought in favor of Beattie & Co., against both Hill and Weakley, and the firm of Beattie & Co., consisted of Armstrong Beattie and Thomas'B. Weakley, who was one of the defendants, and the indorser on the note, so that he was really plaintiff and defendant on the record.

In the Circuit Court the suit was dismissed as to Weakley, and an amendment was made, substituting the names of Armstrong Beattie and Thomas B. Weakley for Beattie & Co., as plaintiffs. To this amendment the defendant objected, but the court overruled the objection, and an exception was saved.

On the trial, the name of the firm and the parties composing it was proved to be in accordance with the amendment. The assignment was also proved, and the signature was admitted to be genuine.

Defendant then introduced evidence tending to show that he only got \$150 from Weakley, and that he signed the note in blank, with authority for Weakley to file it up for \$150 only; that he did not intend to borrow the money; that

Weakley, at the date of the note, had money in his hands belonging to defendant; that the note was to stand and operate as a receipt when a settlement should be made between de-Evidence was further introduced fendant and Weakley. tending to show what amount was due defendant on settlement.

On the other hand plaintiff introduced evidence tending to show that defendant signed the note after it was filled up, and that he got the amount the note called for; that no money was due defendant from Weakley on a settlement; that the note in suit was a distinct transaction, and that after the note was given defendant had promised Beattie to pay it and asked for further time, so that he could get a settlement from Weakley in respect to their accounts. There was a verdict and judgment again for the plaintiff.

The first question that we will consider is, the action of the court in making the amendment in reference to parties on the record. The statutory provision is, that the same cause of action, and no other, that was tried before the justice, shall be tried before the appellate court, upon the appeal. (Wagn. Stat., \$50, § 18.) The rulings upon the construction of this section have not been entirely harmonious, and the cases cannot be all reconciled with each other.

In Clark vs. Smith (39 Mo., 498), there was an account filed with the justice, charging the defendant with certain hogs, and claiming a balance of \$80 as for goods sold and de-There was a judgment for plaintiff, for \$70 and The case was appealed, and in the Circuit Court an amendment was made, alleging that defendant wrongfully took five hogs, the property of the plaintiff, of the value of fifty dollars, and had not accounted for the same, and asked judgment for fifty dollars damages.

This court held that the amendment was improper, and the cause of action changed. Judge Holmes, who wrote the opinion, said: "Here the cause of action is wholly changed. and the amendment was made for the very reason that the evidence which would support the one would not support the other."

The same principle was affirmed in Hausberger vs. Pacific Railroad (43 Mo., 196). That was an action against the company for killing stock. The original statement filed with the magistrate was in the nature of a declaration at common law, and devolved on plaintiff the burden of proving negligence before he could maintain his action. In the Circuit Court an amendment was made to a complaint under the statute, by which negligence was made an inference or presumption of law, and the plaintiff was relieved of the necessity of proving it, and it was decided that the court committed error; that the cause of action was changed, and instead of a common law action it was turned into a statutory provision, clothed with new incidents, and requiring different proofs.

These cases seem to have been overlooked in Button vs. H. & St. Jo. R. (51 Mo., 153), where the complaint was for killing plaintiff's cow, and after an appeal taken, plaintiff was permitted to amend by stating that the killing was negligently done. The judge who delivered the opinion here, said that the cause of action after the amendment was essentially the same as before, but we are inclined to think differently. The case is certainly in conflict with Clark vs. Smith and Hausberger vs. Pacific R. R., and we are of the opinion that they were correctly decided.

House vs. Duncan, (50 Mo., 453) was where the plaintiffs, in their firm name, brought suit upon a promissory note before a justice of the peace. When the case was appealed plaintiff offered to amend by curing the defective statement of their names, and setting out their individual names in full. The court refused to permit this statement to be made, and we held that it was error. No new or different cause of action was proposed to be introduced. The controversy remained the same as it was originally, and the parties were the same, the only difference being that the statement cured a defect in the description of the parties. But there were some remarks made about bringing in new parties, which were not applicable to the facts, and which, upon mature

consideration, I think are hardly sustainable upon a correct construction of the statute.

The facts in this case bring it within the principle actually adjudged in House vs. Duncan. Hill and Weakley were sued as defendants. There is no doubt, under our law, that plaintiffs had a perfect right to dismiss the proceeding against either of the defendants, and go on against the other. After the dismissal against Weakley it was then simply a suit against Hill, the other defendant. Who were the plaintiffs when the suit was brought? Beattie & Co. Who continued the plaintiffs after the dismissal? The same firm. Who composed the firm? Beattie and Weakley. The parties, then, were precisely the same. The suit was brought in the firm name, and that was a defect. The setting out of the names in full cured this defect; but it introduced no new parties, and changed no defense that Hill was entitled to make to the note.

I now pass to a brief examination of the instructions given for the plaintiff. The first relates to signing the note, and is immaterial.

The second was merely to the effect, that if the jury believed from the evidence that Weakley indorsed the note to the plaintiffs, then *prima facie*, they were entitled to recover. This needs no comment.

The third instructed the jury, that if they believed the consideration of the note was only one hundred and fifty dollars, then if they found for the plaintiffs, they should find for that amount. As the jury found for the full face of the note, \$225, this instruction needs no remark. It may be entirely thrown out of the case, and regarded as an abstraction.

The fourth instruction was, that if the jury believe from the evidence, that defendant, Hill, had any money in the hands of Weakley, the amount thereof being uncertain, and that he borrowed the money and gave the note in suit until a settlement could be had, and said money so obtained was the funds of the plaintiffs, and not the money of defendant

or Weakley, and that afterwards defendant bought of Weakley his interest in said money or property, which absorbed defendant's money, or if there was an unsettled account between Weakley and Hill and others, on a different transaction from this one, then there was no defense to the note. This instruction appears to me unobjectionable, especially when taken in connection with those given for the defendant.

The fifth instruction declared, that if the jury believed from the evidence, that defendant promised Beattie that he would pay this note as soon as he could get a settlement with Weakley, in the Weakley, Gunn and Dolman matter, then this may be considered by the jury as evidence tending to prove that the whole amount of the note was due. It is argued that the instruction is bad, being a comment on the evidence. But we think not. It simply tells the jury, that they may consider certain evidence as tending to prove a particular fact, but makes no comment as to its weight, or what its effect may be.

For the defendants the court instructed the jury as follows:

1. "If they believe from the evidence, that on the day of the making of the note the plaintiff, Weakley, had in his hands a large sum of money arising from the sale of lots, the property of said Weakley, and defendant Hill and others, and Weakley, Hill and others were owners of a large number of lots of great value, the title to which was in Weakley, who held the title to the lots for sale, and was authorized to sell the lots and collect the money for the benefit of the joint owners, and the defendant's interest in said money exceeded the amount of the money he got of Weakley, and the defendant, at the date of the note, applied to Weakley for \$150 of said money, which was paid him by Weakley with the understanding that defendant was to give his note for that sum, which was to be accounted for by the defendant to Weakley, upon settlement of their accounts, and the note was executed for that purpose, then it operated only as a receipt, and the verdict should be for the defendant."

2. "If the jury find from the evidence, that the note in controversy was signed by the defendant Hill in blank, or before the same was filled up and he delivered the same to Weakley and authorized him to fill it up as a note for one hundred and fifty dollars, and no more, and that Weakley afterwards filled the note up for two hundred and twenty-five dollars, the verdict should be for the defendant."

Three other instructions were asked for and refused, but they were mainly assertions of the propositions given in the above, stated in different language, and as the two given comprehended the merits of the whole case, those refused were unnecessary.

The first instruction given for defendant stated the whole theory of his case, and the jury found against him on the facts. From their verdict they must have also found that the note was filled up for two hundred and twenty-five dollars before it was signed, and that the transaction was had as stated in plaintiff's fourth instruction.

The evidence on the trial was contradictory, and evidently one of the parties was mistaken about the facts; but it is not the province of this court to weigh testimony or reconcile differences in facts, in purely legal controversies. That belongs exclusively to the jury; they have passed upon the question, and there being no mis-directions as to the law, we cannot relieve against their verdict.

The judgment must be affirmed; all the judges concur.

Brownlee v. Arnold.

WILLIAM H. BROWNLEE, Respondent, vs. SILAS D. ARNOLD, Appellant.

1. Notes secured by deed of trust—Provision that neither note shall be collected till last one fall due—Suit on notes, how affected by.—Where a deed of trust given to secure sundry notes maturing at different dates, provides that none of them shall become due and that the deed shall not be foreclosed, till the maturity of the note made latest payable, the holder who purchases one of the notes with knowledge of the above provision, cannot recover judgment thereon until the last note matures. In such suit the note in action and the deed of trust may be read together and considered as one instrument.

(As to how far the deed qualified the time of payment of the note, the action not being a proceeding to foreclose the deed, Hough, J., expressed no opinion.)

Appeal from Linn Circuit Court.

Ell Torrance, for Appellant.

The note and deed of trust were parts of the same contract. (2 Pars. Cont., 5 ed., 653, and note with cases cited.)

W. H. Brownlee, for Respondent.

The note is in no way affected by the deed of trust, unless respondent chooses to proceed under the deed. He may elect as to remedy. (2 Am. Law Reg. [N. J.], 650; Young vs. Ruth, 55 Mo., 515.)

Sherwood, Judge, delivered the opinion of the court.

On the sixth day of December, 1871, the defendant purchased of one Roberts a certain lot of ground in the town of Brookfield, for the sum of \$3500, paying \$1380 in cash, and executing four promissory notes for the residue, due in one, two, three and four years from said date. To secure these notes a deed of trust of even date therewith was made on the land sold, which deed contained the express condition, that the notes should not become due, nor the deed of trust be foreclosed, until the fourth note should mature, viz: the sixth day of December, 1875. The first note, after its maturity, was assigned to plaintiff, who purchased it with full knowledge of all the circumstances attendant upon its execution.

Brownlee v. Arnold.

An answer making the foregoing allegations was striken out on motion, as constituting no defense to the action, and judgment rendered accordingly. The propriety of this ruling will now be considered.

I. The notes and deed of trust, having been contemporaneously executed, and both relating to the same subject matter, viz: the indebtedness which had accrued, can properly be read together, and regarded as one instrument, so far as concerns the purpose of the present inquiry. (2 Pars. Cont., 553; Hunt vs. Frost, 4 Cush., 54; Hanford vs. Rogers, 11 Barb., 18; Gammon vs. Freeman, 31 Me., 243, and cases cited.)

II. It cannot be successfully disputed that it was perfectly competent for the parties to the contract to so arrange the matter between themselves, that none of the notes should fall due until such time as the last one became by its terms payable. Nor can it be doubted, after inspection of both the notes and deed of trust, that this was the intention which prompted the insertion of the clause in the latter instrument referred to in the answer, nor that the agreement in this regard, had for its basis a valid and sufficient consideration.

III. As the plaintiff purchased the note under the circumstances detailed in the answer, he occupied no better position than the original payee would, had he been plaintiff in the present action.

The judgment will be reversed and the cause remanded; all the judges concur.

PER HOUGH, J.

I concur in the opinion that the note and trust deed may be read together for some purposes, but express no opinion as to how far the trust deed qualifies the time of payment of the note in this case, this not being a proceeding to enforce the trust deed.

THOMAS COOPER, Appellant, vs. THOMAS J. STOCKTON, Respondent.

1. Land, contract for sale of—Title bond—Conveyance by obligor to third party—Rescission of original contract—Suit by obligee for purchase money, etc.—Where one takes possession of land under a bond given to him for conveyance thereof on payment of the purchase money, a deed by the owner to a third party in the meantime, does not of itself, regardless of the circumstances, amount to a rescission of the original contract so as to authorize the obligee to abandon the land and receive back whatever purchase money he has paid out; ex. g. where the grantee in the deed agreed to receive the purchase money and to give the obligee another bond, with like condition to convey on receipt of the money, and especially where the obligee himself agreed to the substitution, the latter cannot recover back money paid out for the land and improvements thereon. And most certainly such action will not lie where the obligor has the land re-deeded to himself, and then tenders the deed.

Appeal from Gentry Circuit Court.

S. S. Brown, for Appellant.

The obligee had the right, without payment or tender of the purchase money, on the conveyance to Liggett, to treat the original contract as rescinded and sue for his purchase money and damages, (Hill. Vend., 2nd. Ed., 250,) and that even though the vendor might receive back the title before the time at which he agreed to perfect the title to plaintiff. (2 Pars. Cont., 5th Ed., 256; see generally, Hurd vs. Denny, 16 Ill., 492; Miller vs. White, 32 Me., 203; Trinkle vs. Reeves, 25 Ill., 214; Burke vs. Pollack, 30 Ill., 328; Gray vs. Dougherty, 25 Cal., 266.)

The alleged agreement of plaintiff to release defendant from performance of his contract, and to take the obligation of Liggett for the same was such a surrender of all interest growing out of the real estate involved, as is contemplated by § 2 of the statute of frauds and perjuries, and was not susceptible of parol proof—so that the evidence on that point was improperly introduced.

Bennett Pike, with Vinton Pike, for Respondent.

 The petition fails to state a cause of action. The alleged conveyance to Liggett was not such a disqualification of de-6—vol. Lx.

fendant to perform his covenants as would excuse an offer to perform on plaintiff's part. The fact that defendant, at a certain period, had no title, does not authorize plaintiff to treat the contract as rescinded. *Non constat*, but defendant might have had the deed, at the time agreed upon, and would have had it if the plaintiff had paid the money. (Robb vs. Montgomery, 20 Johns. [N. Y.], 13 to 13; Greenly vs. Cheever, 9 *Id.*, 126.)

II. There can be no breach of a contract before the time of performance has arrived. In this case the time of performance was when plaintiff tendered purchase money and demanded deed.

III. It cannot be said that defendant was incapacitated from performing the contract on his part. In the view of a court of equity, Liggett was a mere trustee for the performance of the contract of defendant with plaintiff: Under the facts in the case, he might be compelled to execute a deed to plaintiff when the latter entitled himself to one by payment of the purchase money.

Napton, Judge, delivered the opinion of the court.

The petition, in this case, states that in 1869, the plaintiff bought of defendant a certain tract of land in Gentry county, for which he agreed to pay \$800, and paid down \$191.50, and gave his note for the remainder. The defendant then executed a bond, in the sum of \$1,600, obligating him to convey to plaintiff, so soon as plaintiff should pay the full amount of said note. This obligation, it is said, is lost, and cannot be produced, and the plaintiff is unable to furnish a copy. Plaintiff alleged that afterwards he, plaintiff, paid to defendant, at different times, the sum of \$118.75 on said note; that defendant put plaintiff in possession of said land at the time of the purchase, and plaintiff proceeded to make sundry improvements on the land; that he built 250 rods of post and slat fence-worth 75c. per rod-fenced in one acre for a garden with a picket fence, worth \$20; that he grubbed and cleared, and broke. 25 acres, worth \$3 per acre; that in the spring of 1870, plaintiff plant-

ed 40 rods of hedge, worth 75c. per rod, cleared out and walled up a well (worth \$20); that he repaired the buildings at a cost of \$25; that he purchased an addition for said building worth \$20; that he paid out \$6.75 for survey of said land—the sums, altogether, amounting to the sum of \$815.50, expended on payments and improvements.

Plaintiff then avers, that on the 17th of December, 1872, and after all of said improvements had been made, the defendant, who then had the legal title to said land, conveyed said land to one Enoch Liggett; thereby placing it out of his power to convey the same to plaintiff. Wherefore, the plaintiff avers that the said contract of sale has been rescinded by the act of defendant; and that plaintiff, by reason thereof, thereupon surrendered possession of said land, whereby plaintiff has been damaged in the sum of \$1,000, for which sum plaintiff asks judgment.

The answer admits the contract of sale and execution of an obligation to convey, upon the full payment of the purchase money, when it became due, which was on 26th September, 1869. The answer denies that the price was \$800; but says it was about \$600, of which the plaintiff paid about \$45 and executed his note to defendant, dated September, 25th, 1869, for \$456, due one day after date, at 10 per cent. interest from date—the interest to be compounded if not paid annually.

As to the alleged loss of the title bond, defendant is ignorant. He denies improvements to the value of \$800.

Defendant then admits the conveyance to Liggett, as stated in the petition, but asserts that this was done, under an express agreement between plaintiff and defendant and Liggett, with the understanding that plaintiff's note should be transferred to Liggett or a new one to Liggett substituted for the one to defendant, and that Liggett was to convey to plaintiff whenever the purchase money was paid. The answer alleges that said Liggett offered to give plaintiff his written obligation for a conveyance in lieu of defendants; but that plaintiff refused to accept said bond or pay said note or renew said note to Liggett and, therefore, said Liggett, on June, 11th 1873,

conveyed the land back to defendant and defendant tenders his deed and brings the same into court, &c.

Plaintiff's replication denies his consent to this arrangement with Liggett.

Upon the trial the court instructed that the plaintiff was not entitled to recover. A non-suit was then taken with leave, &c.

It is unnecessary to set out the evidence, as there is really no conflict in regard to the material facts of the case. The plaintiff's action is based upon the assumption that so soon as the defendant, after his bond to plaintiff, conveyed the land to Liggett, that fact alone, without regard to the circumstances under which it was made, was a rescission of the contract, and authorized the plaintiff to abandon the land and claim a return of whatever purchase money he had advanced. No allegation is made that he offered to pay the purchase money due, or demanded a conveyance, either from Liggett or defendant.

It is laid down in Hill. Vend. (250), that where a party agrees to convey land, upon performance, by the purchaser, of certain conditions, and designedly incapacitates himself to convey, the purchaser is discharged from the conditions, and that a vendee may bring an action for breach of the contract to convey, before demanding a deed, if the vendor, by his conduct, indicates that he does not intend to perform his contract; and if a party who has agreed to sell an estate is afterwards disabled from doing so, the vendee may recover the money deposited. And to sustain these observations, the case of Miller vs. Whitten (32 Me., 203); Gray vs. Dougherty (29 Cal., 266); Hurd vs. Varney, (16 Ill., 492) are cited.

But the cases are unlike the present, and the doctrine is loosely stated. The cases of Robb vs. Montgomery (20 Johns., 19), and Greeley vs. Chevers (9 Johns., 126), are quite analogous to the present one. The facts established in the present case clearly show, that the defendant did not incapacitate himself from complying with the contract. On the contrary, his conveyance to Liggett, with the assent of plaintiff at the

time, seems to have been designed for plaintiff's accommodation. Liggett was a mere trustee, to carry out the contract. He was to give just such a bond as the defendant gave and to receive and accept just such a note; and if the defendant's personal warranty was desired, he had not disabled himself from uniting with Liggett in the deed.

In fact the result showed perfect good faith on the part of defendant; for when the plaintiff finally declined taking the bond of Liggett, instead of defendant's, the defendant took a reconveyance to himself, and proffers the deed on payment of the purchase money.

The plaintiff makes no allegation of an offer to pay the purchase money, and by the contract no deed was to be made till the purchase money was paid. The note to defendant was payable one day after date. The fact that defendant conveyed to Liggett, even if made without consultation with plaintiff, did not necessarily incapacitate the defendant from conveying when the note was made. (Smith vs. Busby, 15 Mo., 392.)

But the proof shows very clearly that the conveyance to Liggett was made by consent of plaintiff, though subsequently the plaintiff refused to carry out the arrangement between himself, defendant Liggett, and forthwith brought this suit to recover back the money he had paid for the land. The defendant then procured the re-conveyance from Liggett, and was beyond doubt in a condition to make a title.

The judgment is affirmed; the other judges concur.

Coudrey v. Gilliam.

John N. Coudrey, Respondent, vs. Thomas E. Gilliam, Appellant.

- 1. Parlnership-Dissolution of-Parlner trustee, how far-Collections by one member after dissolution-Statute of limitations, when begin to operate in ref. erence to accounts, etc .- 1. Partners inter sese are trustees as to firm property held by them after dissolution, but the trust is implied, not express. Hence, actions between them, relating thereto, are subject to the statute of limitations, 2. The statute does not necessarily begin to run from date of dissolution. Its operation commences with a breach of trust by the partner having partnership property or accounts in charge. And as a general rule the breach takes place after a failure to account and settle within a reasonable time after dissolution, and must be ascertained from the particular circumstances of each case. 3. Where an account has been stated between them at the close of the partnership, the statute, as to the items embraced therein, runs from the time of the statement. 4. Where mutual arrangement, after dissolution, delegates to one member the collection of debts due the firm, no cause of action accrues against him in favor of his co-partner, nor does the statute begin to run, so long as a faithful discharge of that duty postpones a final settlement.
- 2. Statute of limitations—Defense of may be raused by demurrer, when—Motion in arrest.—The defense of the statute of limitations may be made by demurrer when the statement of the plaintiff shows an absolute bar without exception. But where this fact does not appear on the face of the petition the same may be exceedingly defective, and yet, defendant failing to demur, and setting up the statute as a defense—which is traversed by the replication—the defect is not subject to motion in arrest.

Appeal from Chariton Court of Common Pleas.

C. W. Bell, with Chas. Hammond and A. W. Mullins, for Appellant.

As to accounts between partners, the statute generally begins to run upon the dissolution of the partnership. (Patterson vs. Brown, 6 Mon., [Ky.] 10; Bisphan vs. Price. 15 How. [U. S.]. 162, 178; Cochran vs. Rogers, 10 Pick., 112; Coalter vs. Coalter, 1 Rob. [Va.], 79; Sto. Part., 386, note 4 to § 233; Didier vs. Davidson, 2 Barb. Ch., 522.)

The cases which hold otherwise are in the main those constraing a statute of limitations which expressly excepts from its operation accounts between merchants. These cases under our statute are inapplicable. The case of Massey vs. Tingle, (29 Mo., 437) expressly holds that as between partners the statute may be invoked.

Coudrey v. Gilliam.

Here the parties closed out their business in the year 1866, and the suit was not commenced until the 6th of June, 1872. There is no evidence that Gilliam ever admitted an indebtedness to Coudrey, or ever promised to pay him anything after the year 1866, but, on the contrary, he expressly denied any indebtedness to him. If Gilliam had collected the whole of the note, or more than his interest in it, Condrey might have required Gilliam to have accounted to him, Condrey, for his part of the amount so collected. But this could not open up all the matters connected with the partnership, the amount of capital contributed by each, and the amount withdrawn, etc., in the year 1866.

Kinley & Kinley, for Respondent.

 The petition will support a verdict after trial, on the merits, especially since no objection was raised to it by demurrer.

II. Plaintiff's right of action is not barred by the statute of limitations. (Massey vs. Tingle, 29 Mo., 437.) The rule as to merchants' accounts has nothing to do in this case. This is settlement of partnership alone.

After dissolution each partner becomes, as to the firm assets, tenant in common. (Hogendobler vs. Lyon, 12 Kans., 278; Sto. Part., §§ 322-8.) He also becomes a trustee. (Cranshaw vs. Marsh, 1 Swanst., 506; 11 Ves., 5; Pomeroy vs. Benton, 57 Mo., 531; Colly. Part., § 182; Sto. Eq. Jur., §§ 468, 623; Kelly vs. Greenleaf, 3 Sto. R., 93.) Gilliam and Coudrey both owed the firm, and, therefore, as to those amounts, were trustees, and hence, could not invoke the statute of limitations. (Ricord's Adm'r vs. Watkins, 56 Mo., 553; Keeton vs. Keeton's Adm'r, 20 Mo., 530; Kane vs. Bloodgood, 7 Johns., 110.)

Gilliam recognized his fiduciary relation by agreeing from time to time to settle, and led Coudrey to suppose he would do so, and is thereby estopped from pleading the statute.

Condrey v. Gilliam.

Napton, Judge, delivered the opinion of the court.

This suit was brought on June 6th, 1872. The facts stated in the petition in this case are, that plaintiff and defendant on the 26th of May, 1865, entered into copartnership in selling merchandise, for one year from the date of the articles, each putting in the concern an equal amount of capital, and agreeing to share the profits and bear the losses equally; that the business was carried on until the 26th of May, 1866, when the said partnership was dissolved by the terms of the articles, and by mutual consent. The petition further states that there were uncollected notes and accounts in plaintiff's possession, amounting to \$543.28; that defendant has a note against one Blevins for \$66.25; that defendant is indebted to said firm in the sum of \$1500, (and an account is filed to show this) and that the plaintiff is indebted to the firm in the sum of \$300 (another account is filed to show this). The petition further states that no settlement of the accounts and matters of copartnership has been made between plaintiff and defendant, though plaintiff has repeatedly requested such settlement, but said defendant at all times refused.

The petition further states that there are no debts due and owing by said firm in said business. Plaintiff therefore asks that an accounting be taken of all the late copartnership dealings, and the same be finally settled between him and defendant, and if defendant be found owing plaintiff anything on said settlement, that he be adjudged to pay the same, plaintiff being ready and willing, and hereby offering to pay any sum that on said settlement may be found due and payable from him to defendant. It is further asked that the notes and accounts aforesaid be placed in the possession of some suitable person for collection and distribution, and for all orders &c., that to the court may seem proper.

There were filed with said petition five exhibits, one containing a copy of the articles of copartnership, the second a list of the notes referred to, the third an account with defendant to the firm, running down to Dec. 31st, 1866, with one item on Dec. 1st, 1871, as follows: "Apples of T. Sanders

(on note) \$22," fourth, an exhibit of plaintiff's account with the firm, and, lastly, an itemized account referred to in the petition, running down to 1872.

The answer of defendant denies his indebtedness and then states, "that he ought not to be held liable to pay plaintiff on his said supposed cause of action, because he charges and avers that said supposed cause of action arose more than five years before the commencement of this suit."

The record states that the case was submitted to the court on the petition, answer and reply, and the court having heard the testimony and not being sufficiently advised, etc., appointed J. L. Applegate as referee, to examine the books and accounts, and report to the court the state of accounts between the parties. At a subsequent term, the referee reported, and found a balance due plaintiff of \$530.78.

This report was approved by the court, and a judgment was given for the sum, with interest, and an order made that the notes and accounts uncollected be sold by the sheriff, and the proceeds divided.

It is necessary to a proper understanding of the only point presented by this case, to state so much of the evidence as pertains to this point, which was entirely confined to the statements of the parties.

Condrey, the plaintiff, testified, that after the dissolution in May, 1866, the goods left on hand were boxed up and stored until fall, and were then opened and sold at auction or private sale, but not entirely. The remainder left was divided between them. The last sale was December 17th, 1866. "The notes and accounts were not divided. I was to take them and settle up the business. I collected claims and charged them to myself on the books, and when Gilliam got any, charged them to him." Again he says. "In the fall of 1871 Gilliam purchased some apples of T. W. Sanders, and Sanders came to me and said Gilliam told him to have the amount entered on note due by him to Gilliam and Condrey. I gave him credit accordingly. The last item prior to this charge is dated December, 21st, 1866. The Sanders

credit was entered December 1st, 1871. I told Gilliam about it. All business of the firm, advancement of money, purchase of goods, etc., are contained in the books produced. I had conversation with Gilliam in the fall of 1871, and asked for a settlement. We fixed two weeks from that time. Shortly afterwards Gilliam told me he could not settle then, as it was the week of the Keytesville fair, and we then agreed upon the week after, as I understood him. From the dissolution up to the time of commencing this suit. I collected what I could on the notes and accounts of the firm, and en tered the collection on the books of the firm. The books contain all such collections. The last collection was entered June 8th, 1872. It was the agreement made between Mr. Gilliam and myself at the time of the dissolution, that I should take the books, notes, accounts, etc., and settle up the business."

The defendant, Gilliam, testified as follows: "The books were kept by Condrey. I drew my checks against the cash entries in my memorandum book. Condrey put the amount down on one side, and I kept the other side. I bought some apples of Sanders, and wanted to pay him, but he said, no; he owel Gilliam and Condrey. I came down and saw Condrey, and the amount was credited. Condrey furnished me list of notes and accounts; never furnished me regular balance sheet; furnished me several little statements I could not understand."

This was all the evidence in the case, and after hearing the evidence the court, as heretofore stated, referred the matter to Applegate, to make out the partnership accounts, and report the result.

The only objection relied on in this court, and indeed the only objection made below on the motion for new trial and in arrest, was that the action was barred by the statute of limitations, five years and upward having elapsed since the dissolution of the partnership. The partnership was dissolved on the 26th of May, 1866, and this action was commenced on the 6th of June, 1872.

It was well observed by Judge Scott, in the case of Rector's Heirs vs. Rector's Adm'r, (20 Mo., 538) "that the application of the statute of limitations, in courts of equity, to matters of trust, is made difficult from the contrariety of opinion which prevails in relation to it. Whilst all admit that an express or direct trust is not subject to be barred by the statute, a difficulty is experienced in determining what trusts fall under the denomination of express or direct trusts, as well as in ascertaining the period of limitations to be applied after the character of the trust is determined."

Hence, the same learned judge said, in the case of Massey vs. Tingle, (29 Mo., 438) "We know no principle which declares that the statute of limitations begins to run against an action to adjust and settle partnership accounts, from the time of its dissolution. When the account, or an item in the account, is barred, must be determined from the facts in relation to it. The application of the statute must be governed by circumstances. Cases may be stated in which an account may be barred in five years, others may be stated in which an account would not be barred in a much longer term."

And after a careful examination of such English and American authorities as were accessible, I have come to the conclusion that these observations of Judge Scott in Massey vs. Tingle, brief as they are, really embrace about all that can be said on the general principles by which courts of equity are guided, and that the application of the statute depends on the facts and circumstances of each case.

The difficulty is in determining when the cause of action accrues, and this depends on the relations the partners bear to each other, and the duties reciprocally arising from the relation. That they occupy a position analogous to that of tenants in common, so far as the property on hand at the dissolution is concerned, and that they are impliedly trustees is conceded by all the authorities; and consequently the trust is of such a nature as the statute of limitations applies to.

But the question still remains, when will the law consider a breach of trust as having occurred, and at what point of time, therefore, will the statute of limitations commence.

Judge Story observes, in his work on Partnership, (§ 347) that, "as it becomes the duty of all parties in interest, upon a dissolution by death (or otherwise) with all practicable diligence, to wind up and settle the partnership concerns, to pay the partnership debts and obligations, and to distribute the surplus among those who are entitled to it, according to their respective shares therein, each party in interest has a right, in case of any improper delay, or danger of loss, or neglect of duty, to require the aid of a court of equity to enforce the duty and to compel a full account and settlement of the whole and if within a reasonable time, the survivors do not account with them, and come to a settlement, a court of equity will entertain a bill for this purpose, and will, in aid thereof, if necessary, restrain the partners by injunction, from disposing of the joint property and from collecting the outstanding debts. So the surviving partners have each against the other a like right to insist upon a final adjustment and settlement of the partnership accounts and a distribution of the surplus."

Judge Story had previously remarked in section 325, that "notwithstanding the dissolution of the partnership, there still remain certain rights. duties, powers, authorities and relations between them, which the law recognizes and supports, because they are or may be indispensable to the complete arrangement and final adjustment of the affairs of the partnership; and therefore, in a qualified and limited sense, the partnership may be said for those purposes to continue between the parties, until such arrangement and settlement takes place. Indeed, as has been well said by a learned anthor on that subject, " From the very nature of the partnership, engagements may be contracted, which cannot be fulfilled during its existence, exposed as it is to sudden and arbitrary terminations, and the consequence, therefore, must be, that for the purpose of making good outstanding engagements, of taking and settling all the accounts, and converting all the property, means and assets of the partnership, existing at the time of the dissolution, as beneficially as may be,

for the benefit of all who were partners, according to their respective shares and proportions, the legal interest must subsist, although for all other purposes the partnership is actually determined."

"Hence," Judge Story further says, (§ 328) "it is now the admitted doctrine of the common law, that although the dissolution of the partnership disables any one of the partners from contracting new debts, or buying or selling or pledging goods on account of the firm, yet, nevertheless, it leaves every partner in possession of the full power (unless, indeed, upon the dissolution it has been exclusively confided and delegated to some other partner or person) to pay and collect debts due to the partnership, to apply the partnership funds and effects to the discharge of their own debts, to adjust and settle the unliquidated debts of the partnership, to receive any property belonging to the partnership, and to make due acquittances, discharges, receipts and acknowledgments of their acts in the premises. For all these acts, if done bona fide, are for the advancement and consummation of the great objects and duties of the partners; upon the dissolution, to wind up the whole partnership concern, and to divide the surplus, if any, among them, after all debts and charges are extinguished."

It is apparent from these remarks of Judge Story that the mere dissolution of a partnership does not authorize a bill in equity for an account, when by agreement between the parties after dissolution, one of the partners has been entrusted with the power, belonging to both, of collecting accounts and notes unsettled, and there has been no stated account between them. The partner so confided in, is guilty of no breach of trust in proceeding to collect the debts, and in a suit against him, he could not set up the bar of the statute, or claim that the dissolution had occurred five years before suit brought. Nor on the other hand, do I perceive how the partner who acquiesced in this arrangement can set up the statute as a bar to an account.

Undoubtedly where there has been a stated account between the partners at the close of the partnership, so far as all items

embraced in such account are concerned, neither party can disturb it at law, or in equity, after the limitation allowed by the statute has expired. And this is all that was decided in Bispham vs. Price. (15 How., 178.) Mr. Justice Campbell in that case observed: "But if we could doubt upon the intrinsic equities of the parties, the statute of limitations affords a conclusive answer to the bill. The bill and answer agree that this item of the account was ascertained and stated, and all the liabilities of the firm were practically adjusted by this settlement. The amount of the liability of Bisfilian was credited to him and he received the absolution of Archer from all fur-The exception in the Pennsylvania statute in favor of merchants' accounts, according to the numerous authorities of the State courts, does not apply to the accounts of partners inter sese, though this is not universally admitted. But however the law may be as to open accounts, the settled doctrine of the court is, that the exception in the statute does not apply to stated accounts. (Spring vs. Grey, 6 Pet., 151; Toland vs. Sprague, 12 Pet., 300.")

The principle upon which courts of equity act in applying the statute of limitations to settlements or accounts between partners, is very clearly explained by the Vice Chancellor in Tatam vs. Williams (3 Hare, 357), and is in accordance with the views expressed by Judge Scott in Massey vs. Tingle. That was a case, it is true, in which the surviving partners brought a bill against the executors of a deceased partner, but it matters not whether a dissolution is affected by the death of one of the partners, or by the terms of the partnership, or by mutual consent, so far as this question is concerned.

"The question," says the Vice Chancellor, "how long the estate of a deceased partner continues liable to the demands of surviving partners, is not, I apprehend, the subject of any positive statutory enactment, except so far as this court may found its rules upon analogous cases at law. The cases at law, which appear to have been commonly argued upon in this court, as affording an analogy in questions between partner and partner after a dissolution of partnership, are those which

fall within the exceptions as to merchants' accounts in the statute of limitations. Now, notwithstanding the doubts which appear for a long time to have hung over the construction of that exception in the statute. I understand the rule at law now to be settled, that if all dealings have geased for more than six years, the statute, even between merchant and merchant, their factors and agents, is a bar to the whole demand, except where the proceeding is an action of account, or perhaps an action on the case for not accounting * * upon the question whether one partner could, at law, maintain an action of account against his copartner, I will refer only to the very elaborate argument of Mr. Hays, in Collam vs. Partridge (4 Man. & G., 278). In this court there is direct and very high authority for the proposition, that a court of equity will not, after six years acquiescence, unexplained by circumstances, or countervailed by acknowledgment, decree an account between a surviving partner and the estate of a deceased partner. (Barber vs. Barber, 18 Ves., 286; Ault vs. Goodrich, 4 Rup., 430; Bridge vs. Mitchell, Gill. Eq., 224)-a case spoken of by Ld. Eldon in Fowler vs. Hodgson (14 Ves., 185), as a case of anthority; to which may be added the case of Martin vs. Heathcote (2 Eden. 169) and Ld. Henley's note upon that case. The authority of the case of Barber vs. Barber, and consequently the authority of the other cases, is without doubt, much shaken by the observations of Ld. Brougham in moving judgment of the House of Lords in the case of Robertson vs. Alexander (8 Bligh. N. S., 352). For, notwithstanding Ld. Cottenham's remark in Morehouse vs. Scarffle (2 Myl. & Cr., 704), to the effect that the judgment of the House of Lords in any given case does not involve an approbation of all the reasons which each Peer may have given for his vote, so as to make those reasons binding upon courts of inferior juri-diction, it is impossible not to defer to the opinion to which I have adverted, and perhaps difficult to explain the judgment of the House of Lords upon any other reasons, not withstanding the special circumstances of that case. But Ld. Brougham in that case, acknowledged in the clearest manner, that

whether by analogy to the statute, or for any reason, six years was or was not a bar in that case, it was the duty of a court of equity to consider whether, under circumstances of delay, a decree should be made. In this case it is unnecessary that I should rely upon the cases which have decided that this court will not give relief after six years of delay, wholly unaccounted for, inasmuch as in this case it was not six years, but a clear period of 13 years which elapsed between the death of Fowler and the filing of the bill, and no excuse is given for that delay."

Now it will be observed that the British statute, making an exception in favor of accounts between merchants, copied in Pennsylvania, Virginia, Kentucky and other States, is not in our statute of limitations. Hence the case of Patterson vs. Brown (6 Mon., 10), and Coalter vs. Coalter (1 Rob. [Va.] 79), are not applicable here. Our act of limitations (2 Wagn. Stat., 918), provides that "in an answer brought to recover a balance due on a mutual open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item in the account on the adverse side." In a note to Foster vs. Hodgson (19 Ves., 180), referred to in the Vice Chancellor Shadwell's opinion, it is said that an account, though between merchants, if stated, will be barred by the statute of limitations; but if an account between such parties remain open and current, it will be within the exception of the statute; and this distinction between stated and unstated accounts seems well settled, and the only difficulty which has been felt of late years, is whether an account could be con. sidered as a current one, when there has been no dealing between the parties for six years; and it has been held, that it could not be so considered. (Barber vs. Barber, 18 Ves., 286.) Our statute speaks of a mutual open and current account, whether between merchants or other persons, and counts the beginning of the cause of action from the last item in the account on the adverse side.

As in this case, there was really no mutual or current account between the parties, after the dissolution of the partnership, the effect of the entry of the Sanders transactions, in December, 1871, may be passed over, as entitled to no weight in the determination of the main question involved. The plaintiff was, by express arrangement between the parties, entrusted with the notes and accounts, and no memorandum of the business was kept by the defendant.

Considering, however, that the relation between these parties, after the dissolution of the partnership, implied a trust, and that the one entrusted with the collection of the notes and accounts could have been compelled at any reasonable time after such confidence reposed, to account to the other, and that no stated account between them, either temporary or final, was ever made, or any demands for a settlement until 1871, by either party, it is difficult to see how either party could regard the delay or postponement of the settlement as unreasonable. The fulfillment of the trust, in fact, necessarily postponed any final settlement. Moreover, the demand for a settlement in 1871, by the plaintiff, and the agreement of the defendant to meet the plaintiff on a day named, with a view to a final settlement, was a clear admission, not only of the fact that there had previously been no final account between them, but that such account was necessary to a final adjustment of the affairs of the partnership. There was no contradiction between the statements of plaintiff and defendant on this point, nor indeed on any other material point.

The facts are well established. It appears, indeed, that one of the notes, or accounts entrusted to the plaintiff for collection, was not collected until after this suit was brought. There was no breach of trust, on the part of the plaintiff, no unnecessary delay in a settlement, and no opposition to a settlement on the part of defendant until 1871—scarcely a year before this action was brought. There was no ground for a proceeding in court to compel a settlement whilst the mutual understanding and agreement of plaintiff and defendant, upon the dissolution, delegated to the plaintiff the power to collect

the debts due the partnership, and necessarily postponed a final settlement by this arrangement. The application of a general principle upon which courts of equity act might be different in the case of a dissolution of a partnership by the death of one of the partners, where no waiver or estoppel on the part of the dead partner could be claimed, nor any agreement to a transfer of power to the survivor could occur.

The general rule is that after the lapse of the time fixed by starute, the suit for an account cannot be maintained; and courts of equity follow this rule and will not allow a bill for a settlement, after a stated account, or where there is no excuse for a settlement, and one of the partners is dead. But in this case the settlement was voluntarily postponed by both parties and there was no ground for an action to compel a settlement until the refusal of the defendant to account in 1871. The statute of limitations was therefore no bar, under the facts and circumstances of the case.

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It is insisted here that the petition, on its face, showed no cause of action, and that a demurrer would have been sustained to it; and that, although no demurrer was filed, the court, on the motion in arrest, ought to have decided in favor of defendant.

Under our decisions, the defense of the statute of limitations may be made by demurrer, where the statement of the plaintiff shows an absolute bar without exception (22 Mo., 473); but in this case, no demurrer was filed, but the bar of the statute was pleaded in the answer, and the answer denied by replication, though the replication is not copied in the record. (25 Mo., 182.)

Upon these pleadings, we cannot say that the motion in arrest should have been sustained. The petition was very defective, but there was no demurrer to it.

We therefore affirm the judgment. The other judges concur. Tully, et al. v. Canfield, et al.

B. K. Tully, et al., Appellants, vs. D. B. Canfield, et al., Respondents.

1. Conveyances of military bounty land—Acknowledgments—Certified copies, when admissible.—Where a deed conveying military bounty land is acknowledged according to the statutes of Missouri, a certified copy thereof may be shown in evidence without previous proof of the loss or destruction of the original, and it is immaterial whether it be acknowledged in or out of this State. Sections 35, 36 and 38 of the statute relating to conveyances of real estate (Wagn. Stat., 278, 279) refer exclusively to conveyances made outside of this State and acknowledged in conformity to the lex loci,—but defective under the Missouri statute. (Totten v. James, 53 Mo., 494, criticised.)

Appeal from Linn Common Pleas.

S. P. Huston, for Appellants.

I. The deeds were acknowledged according to the laws of this State, and the record copy was admissible in evidence under the general law. (Wagn. Stat., 278. § 30, 1872.)

II. Plaintiffs claimed under general warranty deed, and in such case record copies may be read as, the "warrantor is presumed to retain the title papers anterior to his own for his own protection." (Lord Buckhast vs. Fenner, 1 Coke, 1; Jackson vs. Woolsey, 11 Johns., 453; Eaton vs. Campbell, 7 Pick., 10; Barton vs. Murrain, 27 Mo., 235; Will. Real Est., 546.)

W. H. Brownlee, for Respondents.

I. Copies of the record of the deeds were not admissible until the loss or destruction of the originals have been proven. (Barton vs. Murrain, 27 Mo., 240; Christy vs. Cavanaugh, 45 Mo., 375; Crispen vs. Hannavan, 50 Mo., 415; Wagn. Stat., 1872, 278, 279, §§ 35, 36, 38.)

Sherwood, Judge, delivered the opinion of the court.

Ejectment for recovery of certain land in military bounty land district.

The only question the case presents is the proper construction to be given to sections 35, 36 and 38 of chapter 35 a relation to Conveyances. (Wagn. Stat., 278, 279.) Tully, et al. v. Canfield, et al.

The obvious and accomplished objects of the foregoing sections were, First, to waive, as to instruments conveying or affecting military bounty lands, any informality caused by non-compliance with our laws respecting acknowledgments, provided said instruments were acknowledged in accordance with the laws of the State where executed; second—to put the instruments thus acknowledged, on the same footing as though they fully conformed to our general law in reference to acknowledgments, with but the single exception, that until proof of loss or destruction of the originals, copies thereof were precluded from being read in evidence.

The sections mentioned can manifestly have no reference except to that class of conveyances specified therein; and can by no possibility apply except upon the triple concurrence of First—a conveyance made of military bounty land; Second—made outside of this State and within the United States: Third—acknowledged in conformity to the *lex loci* of its execution.

And, unless the instrument fully complies with the conditions specified in those sections, it fails to fall within their purview; and whether relating to military bounty, or other land, is to be exclusively controlled by the provisions of the general law respecting acknowledgments.

The cases of Barton vs. Murrain, 27 Mo., 235; Christy vs. Cavanaugh, 45 Mo., 376; Crispen vs. Hannavan, 50 Mo., 415, are not in antagonism to this view, but, rather accord therewith, as those decisions only apply to a class of instruments falling fully within the terms of the sections under discussion.

The case of Totten vs. James, (55 Mo., 494) is at variance with the conclusion at which we have arrived in the case at bar; but doubtless owing to momentary inadvertence as to the proper distinction to be taken between instruments relating to military bounty land, the acknowledgment of which conforms to the laws of other States, and conveyances of the same description of land the acknowledgment of which, whether taken in this State or elsewhere, are in full conformity to our own laws.

As the conveyances in question fully complied with our general law in relation to acknowledgments, it was wholly immaterial where those acknowledgments were taken.

For these reasons, the instruction, in the nature of a demurrer to the evidence which effected the exclusion of the copies of deeds offered by plaintiffs, because the loss or destruction of the originals was not first proven, was erroneously granted.

Judgment reversed and cause remanded; the other judges concur except Judge Vories. absent.



IN THE MATTER OF JARVIS S. ROGERS, Appellant, vs. THE COUNTY COURT of CLINTON COUNTY, Respondent.

Certiorari only brings up the record—Facts dehors should be proved.—The effect of the writ of certiorari is merely to bring up the records and proceedings of the lower court. And, so, where a petition for that writ charged facts dehors the record, showing the illegality of a certain county tax, on a hearing of the cause, those material to the case should be proved or admitted as in other trials; otherwise the writ should be dismissed.

Appeal from Clinton Circuit Court.

J. F. Harwood, for Appellant.

Thomas E. Turney, for Respondent.

Vories, Judge, delivered the opinion of the court.

The petitioner sued out of the Clinton Circuit Court a writ of certiorari which was directed to the County Court of said county for the purpose of reviewing their action in reference to the assessment of certain taxes on property belonging to him. After the return of the writ the case was examined and judgment rendered in favor of the defendant; whereupon the plaintiff appealed to this court.

The facts appearing from the record of this case are as follows: "That on the 2nd day of May, 1874, the complainant, Jarvis S. Rogers, presented a petition to the County Court of Clinton County in which he represented that there was a tax assessed on the tax books then in the hands of the collector of said county, against said complainant, for the year 1873. amounting to one hundred and fifty-four dollars, which tax was assessed against him on account of bank capital and on account of license as banker and exchange dealer, which said assessment was not authorized by law; that said tax was unlawful in this, that the complainant is, and was at the time, a resident of the county of DeKalb, in the State of Missouri; that, among other vocations, he had for several years past been engaged in the business of a broker and exchange dealer with his office located in the town of Cameron, in Clinton County, Missouri; but that during all of said time he had resided with his family in the county DeKalb; that he has never been a resident of Clinton County; that in his business of broker he had received money on deposit and loaned the same to his customers; that at the time he commenced said business, he deposited with his correspondent in New York five thousand dollars in United States bonds exclusive of interest coupons ; that he was the sole owner of said bonds and that they have been and are still on deposit as aforesaid as a security against the stringency of the money market and other contingencies, etc.; that he then was and had been since the 1st day of January, 1873, the sole owner and manager of said business of broker and exchange dealer, carried on in said town of Cameron, and which business was carried on under the name of the "Park Bank;" that he has always since he commenced said business paid the collector of taxes for Clinton County the license tax required by law for the carrying on and transacting said business; that he has been assessed for and has paid the taxes upon all of the personal property, of every description, owned by him which is taxable under the laws of this State, in the county of DeKalb where he resides; that he did not appear before the board of equalization and board of appeals for the

year 1873 for the reason that he was not a resident of Clinton County and had no knowledge that said assessment had been made against him in said county; that the five thousand dollars in bonds aforesaid is and was the only capital or funds invested in his said business of broker and exchange dealer for several years past, and that complainant was the sole owner of said bonds.

The complainant prayed that said assessment and tax entered on the tax book of the collector of said county, being illegal and void, the said court would abate and set aside said assessment, etc.

This petition was verified by affidavit of complainant's attorney to the effect that he believed it to be true.

The said County Court after having heard and considered said petition dismissed the same for the reason that they had no jurisdiction over the matter.

The complainant afterwards on the 28th day of April, 1874, appeared in the Clinton Circuit Court and on his application a writ of certiorari was issued out of said Circuit Court directed to said County Court requiring it to send up a transcript of the proceedings had in said cause. This writ was served and the County Court made a return thereto in which it set forth the petition filed in said court by the complainant, in substance as has hereinbefore been stated, together with a a copy of the assessment made against complainant and the proceeding had in said court on said petition, which said copy from the tax book and proceedings in the County Court is as follows:

"Tax book of personal property of the county of Clinton, State of Missouri for the year 1873, assessed August 1st, 1873, page 95, Jarvis S. Rogers (Cameron) Exchange Broker, total personal property \$5,000, State taxes, \$22.50, county taxes \$27.50, road tax \$7.50, railroad sinking fund \$7.50, school tax \$100, aggregate \$165."

The copy from the entries made in the County Court was as follows: "Now at this day here comes Jarvis S. Rogers by his attorney and presents a petition praying the court to

set aside the taxes for the year 1873, assessed against said petitioner on bank capital owned by him, the said petitioner. The court being advised in the premises ordered that the same be and the same is hereby dismissed for the want of jurisdiction."

After this return was made by the County Court to the Circuit Court on the 7th day of May, 1874, the cause came on for hearing in said Circuit Court. It is admitted by the parties that no evidence was offered by either party, but that the case or matter was submitted to the court on the petition of the complainant, and the return made to the writ of certiorari. The Circuit Court found for the defendant and rendered a judgment against the complainant for costs. The complainant filed his motion for a new trial which being overruled he excepted, and appealed to this court.

The complainant in this case, in the Circuit Court, asked the court to make several declarations of law as applicable to the case, but as there was no evidence given on the trial we cannot say whether said declarations of law were applicable to the case or not; and we are left in the same state of uncertainty in reference to the decision and judgment of the court.

The certiorari only brought the record and proceedings in the County Court before the Circuit Court. When the record came to the Circuit Court, the case was there to be tried and the essential matters of fact stated in the complainant's petition to show that the assessment against him was illegal should have been proved, unless they, in some way, were admitted on the record; but the complainant simply presented his petition to the court and asked the court, without evidence, to assume that the petition contains the truth.

In such a case we would not be authorized to say that the judgment of the Circuit Court was wrong.

The judgment will be affirmed; the other judges concur.

JOSEPH MYLAR, Appellant, vs. John Hughes, Respondent.

1. Entry upon fraction of quarter section—Conveyance of larger sub-division by disseizer with deed back to himself—Color of title.—The mere fact of an entry upon and occupation of a fractional sub-division of a section of land, set apart under the United States surveys in Missouri, will not give color of title to a larger sub-division thereof, within the meaning of \$5 of the statute of limitations (Wagn. Stat., 917), unless he has acquired title by paper conveyance or inheritance, or contract from another who has previously assumed to be owner. And the disseizor cannot, by a conveyance to a third person, of the larger tract, and taking a deed back to himself, obtain color of title thereto.

Where one is said "to have color of title," the phrase implies that some act has been done, or some event has occurred by which some title, good or bad, has been conveyed to him.

- 2. Statute of limitations—Failure to take possession of land for twenty years—Ouster necessary to direct title.—One who has the title to land but fails to take actual possession of it for twenty years, is not for that reason barred by the statute of limitations. The title carries with it the seizin, and to divest it after any lapse of time, great or small, there must be an actual ouster or a constructive disseizin, by adverse possession of some part of the tract under color of title.
- Land—Occupancy of without claim or color of title a trespass.—The taking
 possession of land without any color of title or assertion of claim thereto, is
 a mere trespass.
- 4. Lands—Burning of records—Handbills as evidence.—Where all the records pertaining to the sale of land were destroyed by the burning of the county court house, hand-bills advertising the date of sale and description of the property, may be used as evidence in suit for the land.
- 5. Land—Patent—Decree as to—Good collaterally as against mere possession.— A decree divesting the title to land out of an original patentee, and vesting it in another, cannot be attacked collaterally on account of mere irregularities in the proceedings, by one not a party in interest, and having no claim to the property other than naked possession.

Appeal from Caldwell Circuit Court.

Crosby Johnson, for Appellant.

I. The court erred in admitting the declarations of David Hughes when he claimed title to the land in dispute. Defendant and his ancestor never had actual possession of this land. Their possession, if any they had, was constructive. To constitute constructive possession, the claim must be under color of title. (DeGraw vs. Taylor, 37 Mo., 310; St. Louis vs. Gorman, 29 Mo., 593.) To constitute color of title

there must be an instrument, having a granter and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance. (3 Washb. Real Pr., 138, § 36 a.) No mere words of claim will supply the place of color of title.

"Constructive title is never based upon a claim merely. There must be a deed purporting to convey the whole, or some proceeding or instrument, giving color and defining boundaries, as well as actual possession of a part." (Long vs. Higginbotham, 56 Mo., 245; Fugate vs. Pierce, 49 Mo., 441, 447-S.) In a suit for the title to land, the declarations made by a party in possession, asserting his title, are not competent testimony. (Morey vs. Staley, 54 Mo., 419; McLean vs. Rutherford, 8 Mo., 109; Criddle vs. Criddle, 21 Mo., 522; Turner vs. Belden. 9 Mo., 797.)

II. Even if David Hughes gave a deed of trust to Grubb, David did not and could not hold or claim under that deed. It would be no color of title for him. Nor could his possession enure to James M. Hughes.

III. Defendant, being a stranger, cannot assail the decree, either directly or collaterally for irregularities, or for anything which did not go to show want of jurisdiction on the part of the court. That final judgment was rendered at the return term, is an irregularity for which the case on error or appeal might have been reversed, but cannot be attacked collaterally. (Brackett vs. Brackett, 53 Mo., 265; Carsin vs. Sheldon, 51 Mo., 436.)

J. M. Hoskinson, with Franklin Porter, for Respondent.

I. A written conveyance is not necessary to give color of title. "Whatever title would authorize a party in possession of a part of a tract to maintain an action against a wrong-doer, for a trespass on the remainder of the land, would be a sufficient color of title under the statute of limitations as against the real owner. It is not necessary that this color of title should be created by deed or other instrument of writing. It may be created by an act in pais without writing,"

per Adams, J., in Rannels vs. Rannels (52 Mo., 112—disapproving and overruling City of St. Louis vs. Gorman, 29 Mo., 592, Fugate vs. Pierce, 49 Mo., 441 and Crispin vs. Hannavan, 50 Mo., 536, so far as they enunciated a contrary doctrine; see, also, McCall vs. Neely, 3 Watts, 72; Bell vs. Longworth, 6 Ind., 277.)

II. But either the deed from Grubb to J. M. Hughes, made in 1856, or that from J. M. Hughes to David Hughes, made soon after, and burned in April, 1864, both conveying all of the north half of section 15, gave ample color of title to all of said half section including the land in suit to respondent's grantors, more than ten years before this action was brought. Any instrument having a grantor and a grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described. (3 Wash. Real Pr., 137; Brooks vs. Brayn, 35 Ill., 394.)

III. Plaintiff failed to show that he ever had title to the land in suit. The transcript wholly fails to show that the land in controversy was ever patented to Squire Bozarth.

NAPTON, Judge, delivered the opinion of the court.

This was an action of ejectment to recover the west half of the north-west quarter of section 15, township 56, range 29.

The plaintiff produced in evidence a patent from the United States for the land in controversy, to one Squire Bozarth, the date of which is not stated, and a proceeding in equity in 1870, to divest the title from Squire Bozarth to his brother. John Bozarth; and then produced a deed from John Bozarth to himself.

The patent is not copied in the record by agreement of counsel, but from subsequent testimony we may infer that it was dated as far back as 1838 or 1839, and perhaps earlier.

The only defense relied on was the statute of limitations, and the testimony on this point is exceedingly vague and confused; and it is difficult to state the precise state of facts on which the instructions and subsequent verdict and judgment of the court were based.

The main facts, however, which may be assumed as uncontradicted and beyond dispute, seem to be about as follows:

David Hughes, the father of the defendant, was in possession of a farm, lying partly in the north half of section fifteen, in 1839 or 1840. His house, which some of the witnesses call the "old Jo. Smith house," was in or near the town, of Far-West, and his farm, actually enclosed and cultivated, contained about 100 acres of land, lying mostly in the north-east quarter of section 15, and partly in a section north of 15. The origin of the claim or title to this farm nowhere appears in any portion of the evidence given at the trial on either side.

It does appear, however, beyond dispute, that in 1855, David Hughes conveyed the north half of section 15 (which embraces the land in controversy) together with some 60 acres in section 10, to John P. Grubb, of St. Joseph, to secure a loan of about \$1,300 made by one Roberts of the same city.

There having been a failure of payment on the part of Hughes, Grubb, the trustee, sold the land under the deed, on the 28th June, 1856; and James M. Hughes, of St. Louis, became the purchaser, through an agent of his, sent to Kingston for the purpose. The sum bid was about \$1,500. After this J. M. Hughes made a deed for this same land to David Hughes, said Hughes agreeing to give his note or notes for the amount of the purchase, with interest, and to secure the same by a deed of trust.

The witness who testifies to these facts then proceeds: "said deed of trust and notes were sent to me with the deed to David Hughes by James M. Hughes. The deed of trust and note or notes above referred to were burned at the time of the burning of the court house in Kingston, in April, 1860. They were in my possession when burned. After this, and after the death of David Hughes and James M. Hughes, the land was sold under a deed of trust, executed and made by said David Hughes at Kingston, and bought in, as I now remember, by Calvin F. Burns, &c." This is all the testimony in reference to the deed of J. M. Hughes to David Hughes.

The history of the subsequent deed is clear enough. On the 19th of July, 1866, David Hughes conveyed to Hardwick, as trustee, to secure a note for \$1,800, given to C. F. Burns, dated in 1860, and payable nine years after date. The half section conveyed in this deed, which includes the land in controversy was subsequently conveyed by Hardwick, in 1869, to Calvin F. Burns; and on the 22nd of December, 1870, Calvin F. Burns conveyed this same land to John Hughes, the defendant, a son of David Hughes.

In regard to acts of ownership or verbal declarations of own ership of the land in controversy, the testimony of Th. C. Hughes, a son of David Hughes, was, that his father moved to the county in 1839; that he cultivated a field of 100 acres in the north half of section 15, but not including the 80 acres now in dispute, nor any part of it; that he claimed the north half of the section by a deed from J. M. Hughes; that from 1841 to 1844, he had a race track on the north-west quarter, which passed over an acre or two of the 80 acre tract sued for; and upon one occasion he authorized a neighbor to cut firewood on this western 80, of the north half of the section.

It was proved that David Hughes never gave in this land to the assessor, and that it was taxed as belonging to one Sam. Stewart. It also appeared that Bozarth had paid the taxes on the 80 acre tract in question, in 1844 and 1845, but neglected to pay any thereafter, thinking it had been sold for non-payment of taxes.

Omitting for the present any notice of the minor questions presented by various exceptions taken at the trial, it is obvious that the merits of this case depend upon the construction which is to be given to the phrase "color of title," so frequently found in adjudications and text books, in connexion with the facts in evidence.

That the original entry of Hughes was without color of title, we are left to presume, as none was shown; that an entry upon 80 acres of land and an actual possession of the same will not give "color of title" to 160 acres, without some paper conveyance to the disseizor, or some claim based on the pecu-

liar facts of the case, is manifest, and it is equally plain that the disseizor cannot make his title any better by giving a deed to some third person and taking back a conveyance to himself.

C. J. Gibson, in McCall vs. Neely (3 Watts, 72), discusses this subject carefully, and his conclusion is expressed thus: "To give color of title, would seem not to require the aid of a written conveyance, or a recovery by process and judgment, for the latter would require it to be the better title. I would say that an entry is by color of title when it is made under a bona fide and not pretended claim to a title, existing in another. It is impossible, therefore, to say that a disseizor, claiming to be the true owner of a survey, as he may in fact be, without being named in the warrant, does not enter by color of title."

These observations of this eminent judge are plain enough to convey his meaning, as applied to the system of land surveys and warrants in Pennsylvania; but under the system of surveys adopted by the federal government for the sale of their land in the Missouri Valley Territory and Louisiana, some modification of the principle, or of its application, seems necessary.

In Pennsylvania, as in Virginia, lands were granted upon surveys of no specified extent, and conforming to no fixed system. Each warrant contained a specified number of acres and specified boundaries, perhaps to be determined by water courses, mountains or other natural objects, or contiguous surveys. The surveys might contain 500 or 1000 or 5000 acres, or any intermediate quantity, depending upon prior settlements, or grants or upon the present bounty of the government issuing the warrant. Each warrant and survey was, however, distinct and isolated, and had no connexion with any general system.

But in this country all the public lands are surveyed into townships, sections and sub-divisions of sections, each survey containing not only a definite number of acres, but precisely the same number (barring slight inaccuracies) contained in a survey of a corresponding township, or section or sub-division of a section. It cannot be said, therefore, that one who en-

ters on and cultivates a portion of a 40 acre tract, which is the smallest sub-division known to our system of surveys, pretends thereby to have any claim under color of title to the whole section, unless he has some paper title from some other person, or by inheritance or contract has acquired the right from another who has previously assumed to be the owner.

Nor can be get a color of title to the section by simply making a deed to another person for the entire section, and then taking a deed back to himself. Such a transaction, without any consideration, would be regarded as a mere fraud.

But can the deed to a third person, in the case supposed, when made in good faith, and upon ample consideration, have the effect to give the grantor color of title? We think not. It is no better, so far as the grantor is concerned, than a verbal declaration from him would be, that he owned the section of land he conveys; and mere verbal declarations cannot elevate him above a trespasser to an owner. (Morey vs. Staley, 54 Mo., 419—and cases there cited.) It is undoubtedly an act indicating a claim of title; but it cannot elevate the claim to one "under color of title;" and the latter, it is needless to say, is necessary, in order to protect the claim beyond the limits of actual possession under the statute of limitations.

The fifth section of our act concerning limitations, declares that "the possession, under 'color of title,' of a part of a tract, in the name of the whole tract claimed, and exercising, during the time of such possession, the usual acts of ownership over the whole tract so claimed, shall be deemed a possession of the whole of said tract."

This provision seems to be a mere codification of well settled principles; but the question as to what constitutes color of title, is left where it was before.

An examination of the opinion of this court, in City of St. Louis vs. Gorman, (29 Mo., 602) will show that it was not for a moment supposed that a disseizor could claim his possession as under color of title, beyond its actual limits, merely by making a deed to a third person. As Judge Scott observed in that case, "the evidence relied on would just as well show that

he had a color of title to all the land unoccupied within the commons;" so it may be said here, that Hughes might as well have claimed the whole section, and under such deed have asserted a color of title. And the court say in that case—"when we say a person has color of title, whatever may be the meaning of the phrase, we express the idea, at least, that some act has been done, or some event transpired, by which some title, good or bad, to a parcel of land, has been conveyed to him." Not that he has conveyed it to some one else.

Applying these principles to the facts of the present case, as far as the record discloses them, it is apparent that the claim of David Hughes to the north half of section 15, under color of title, originated with the deed from James M. Hughes.

And here is presented an obscurity in regard to this deed which prevents any final disposition of this case; and which might have been removed by the witness and the only witness who testified concerning this deed. It is true that another witness, the son of David Hughes, speaks of his father claiming the half section, under a deed from J. M. Hughes, as early as 1843 or 1844; but the statement is so indefinite, as to date, as to leave the inference that he was merely referring to the deed made by said J. M. Hughes, after his purchase under the sale of Grubb.

The testimony of C. F. Hughes, in relation to this deed, is exceedingly vague. It does not appear that this deed was ever delivered. It does not appear whether it was sent to him as an escrow, to be delivered to David Hughes, upon his executing the notes and deed of trust spoken of, or whether it was sent to him as the agent of David Hughes, or whether it was recorded.

It appears that the notes and deed of trust were burned in the witness' office in the court house in 1860, when the court house and all its contents were destroyed by fire. It is not stated whether this deed was burned at the same time. It might be inferred, from the subsequent deed made by David Hughes to Hardwick, in 1866, that the deed had been delivered to David Hughes, either in person or to his agent; though

this inference is merely conjectural, as the date of the death of J. M. Hughes is not stated. It only appears that he and David Hughes were both dead at the time of the trial in 1872 or 1873. As this was a question of fact for the jury, or in this case, for the court acting as a jury, it would not be our duty to interfere, but that it is difficult to conjecture, from the various instructions given by the court, which view was entertained by the court on this point of the case.

Unless the instructions have been mis-recited in the record, they appear to be obviously contradictory.

The first instruction given for the plaintiff was correct, and is as follows: "Proof of David Hughes claiming the land in controversy, is no evidence of his possession, unless he claimed said land by color of title, as a part of the tract of land upon which he resided." The second instruction which was refused was, "Color of title cannot be established by a chain of conveyances commencing with a conveyance made by David Hughes; but must commence by a conveyance made to David Hughes." The first clause of this instruction is rather broad and indefinite and liable to misconception, but the last clause is correct and explains the meaning of the first clause, and it might well have been given.

The 3rd instruction asked by plaintiff was given, and is thus: "The fact that said David Hughes made conveyances of said land is no evidence that he had the title or color of title to the same; and his purchase of said land from James M. Hughes, as purchased under the deed of trust made by David Hughes, vested the said David Hughes with no other or greater title than he had at the time he executed the deed of trust."

It is difficult to understand what is meant by this instruction, unless we refer to the next instruction, which is in these words: "The conveyances offered in evidence, by defendant, show a color of title in him only since the date of his deed from Calvin F. Burns, and a color of title in said Burns, only from the date of his purchase of said land from Sam. Hardwick, trustee."

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If these two instructions are to be understood as their terms would seem to imply, it is difficult to see how the court could find for the defendant, seeing that the deed of Burns was not made till 1869, only three years before suit brought.

Various instructions asked by plaintiff were refused; but it is unnecessary to copy them. I will merely quote some of

the more prominent ones given for the defendant.

1. "If the court, sitting as a jury, finds from the evidence, that defendant and his grantors have been in actual, open and continuous possession of part of the old Hughes farm, having deed to the whole north half of said section 15, township 56, range 29—and claiming to own the same, for the period of ten whole years next before the commencement of this suit, then the court will find for the defendant."

- 2. "If the court finds from the evidence that in the year 1856 or 1857, David Hughes was in possession of what is known as the old Hughes farm, situate on the north half of section 15, etc., holding the same under a deed from J. M. Hughes to said north half of section 15, claiming to own the whole of said north half, and that said David Hughes, while he was so claiming to own the same and in possession thereof, deeded the same to Sam. Hardwick to secure certain notes, given to Calvin F. Burns; that said trustee and Hardwick proceeded to sell said lands at public auction, and said Calvin Burns became the purchaser, and that afterwards, said Calvin F. Burns conveyed said land to defendant, John Hughes, and said defendant, John Hughes, has been in possession of part of the tract, claiming the whole under a deed, and remained in such possession until the bringing of this suit, the court will find for defendant,"
- 3. "If the court finds that John Bozarth, plaintiff's grantor, for 20 years from and after the year 1849, claimed no title in, and was not at any time during said period in the possession of, the premises in question, the judgment must be for defendant."

Two additional instructions were given for defendant, but they assert the same rules of law stated in those copied.

The first two instructions are ambiguous and evasive of the point raised by the evidence, unless they were designed to assert that where a party who is in possession of a part of a tract of land, without any color of title, for several years, afterwards gets a color of title within the period fixed by the statute of limitations, the law will cause this color of title to relate back and attach to his original possession and thus antedate the running of the statute to the period of his first entry.

The first instruction seems to assert that a party who has a title to land, but who omits to take actual possession of it for 20 years, is barred by the statute of limitations, although no actual adverse possession by any one else has occurred.

The title carries with it the seizin; and there must be an actual ouster to divest it, at any length of time, or a constructive disseizin by an adverse possession of part of the tract under color of title.

As the case must be remanded on account of these erroneous instructions, it is proper to advert briefly to one or two minor points made on the trial.

It is contended, in this case, that the establishment of a race track over a corner of the land in dispute, in 1842, and allowing a neighbor to cut a few loads of wood on the tract, were such acts of ownership as would constitute an adverse possession. But it is not pretended that Hughes' claim, if he had any, was at the date of these acts, under any color of title whatever. This was long anterior to any deed made even by himself; and the acts could be regarded in no other light than mere trespasses, and not such acts as would apprise the true owner of any hostile claim.

We see no objection to the admission of the copies of the deeds from Hughes to Hardwick and from Hardwick to Burns; nor to the introduction of the printed hand-bill or advertisement of the property by Grubb. Under the circumstances, the handbill was an important link in the evidence, and especially calculated to throw light upon the date of the sale—and the exact description of the land—matters which in the destruction of all the original documents and deeds and

records, by the burning of the court house, could only have been established by secondary evidence.

The decree by which the title to the land in controversy was conveyed to plaintiff's grantor, could not be attacked collaterally for such irregularities as have been pointed out. It was good against all the world, except such as had an interest and a right to have it set aside; and the defendant had no interest in it whatever. Whether the title remained in the original patentees, or in the parties to whom this decree transferred it, could not concern the defendant, who claims only by a possession adverse to the patentee.

The judgment is reversed and the case remanded; the other judges concur.

James Grady, Plaintiff in Error, vs. The American Central Insurance Company of St. Louis, Defendant in Error.

- Agent—Acts of sub-agent, when binding on principal.—The rule that an agent
 cannot delegate his powers unless the sub-agency be directly authorized or ratified by his principal, with full knowledge of the facts, has no application to
 acts purely ministerial. In such cases if he directs the act or being aware
 of the circumstances, afterward adopt it as his own, that is sufficient.
- 2. Agent—Authority of sub-agent to sign insurance policy—How granted—How shown.—Where a policy of insurance is signed by a sub-agent for the agent, and the latter afterwards takes the policy, receives the premium, and, with full knowledge of the facts, re-delivers the instrument, it thereby becomes the act of the company as much as though signed by the agent himself. And to prove that such authority is recognized in the sub-agent by the company, similar previous transactions may be shown in evidence.
- 3. Evidence—Execution of insurance policy—What testimony sufficient to give question as to, to jury—Proof heard by court in absence of jury.—In suit on a policy of insurance, where defendant pleads non est factum, any evidence tending to show the execution of the instrument, even though contradicted, will be sufficient to give the paper to the jury, who are then to determine what weight shall be attached to the testimony. As to the right of the court to pass upon testimony touching the execution of a paper, a distinction may be drawn between a document whose execution is the main issue being tried, and one the execution of which is preliminary or collateral to the main controversy. In the former case it is a mere usurpation of the province of the

jury, and a practice totally unauthorized, for the court to withdraw the panel and proceed of its own motion to hear testimony touching the execution of the instrument.

4. Insurance policy—Suit upon—Defenses—Inconsistency.—[The court intimated without expressing an opinion, that in suit on an insurance policy the defense of non est factum, and "that the policy was to be issued on property to be occupied as a boarding house," etc., etc., might be inconsistent pleas.]

Error to Buchanan Circuit Court.

Ranney and Vories, for Plaintiff in Error.

I. Whether the execution of the policy of defendant in this suit was sufficiently proven, or whether the acts of the agent Corby, if informal on account of the manner in which such policy was signed, were ratified or waived by the defendant, were questions solely for the consideration of the jury. (Benton vs. Klein, 42 Mo., 98; Deere vs. Plant, 42 Mo., 60; McFarland vs. Bellows, 49 Mo., 311; Wannell vs. Kem, 57 Mo., 478; Allen vs. Jones, 50 Mo., 205; Sto. Ag., §§ 252, 253.)

II. Persons dealing with agents clothed with apparent authority, have the right to rely upon their acts and declarations respecting matters within the scope of their apparent authority. (Summer vs. Saunders, 51 Mo., 89; DeBaum vs. Atchison, 14 Mo., 543; Howe Machine Co. vs. Snow, 32 Ia., 433; Brook vs. Jamison, 55 Mo., 505.)

III. The authority of the agent need not be proved by an express contract of agency, but may be shown by the habit and course of business of the principal. (Johnson vs. Jones, 4 Barb., 373; Perkins vs. Wash. Ins. Co., 4 Comst., 645; Com'l Bank vs. Morton, 1 Hill, 501: Tradesman Bank vs. Astor, 11 Wend., 87; Franklin vs. Globe M. Ins. Co., 50 Mo., 461, and cases cited; Sto. Ag., §§ 252, 253.)

Doniphan & Reed, for Defendant in Error.

I. The court did not err in sending out the jury during the examination of J. A. Corby. The question was not the weight of evidence, but the admissibility of the policy. The proof of this question was of course addressed exclusively to the court.

II. The court did not err in refusing to allow the policy to be introduced. There was no proof of its execution. (17 Mo., 440.)

III. There was no proof of ratification, with a full knowledge of all the material facts, by the company. (Sto. Ag., § 250.) Castle, the only witness for plaintiff on this point, said he did not know whether the premium that was paid in was ever sent to the company, or that the company knew, before they were advised of this loss, that there was such a policy in existence.

IV. The signing of this policy was not a mere ministerial act, such as an agent may properly delegate, but required judgment, care and skill, such as the agent alone could exercise. (45 Mo., 221; 1 Hill, 501.)

Vories, Judge, delivered the opinion of the court.

This action was founded on a policy of insurance charged to have been executed and delivered to plaintiff by defendant, in which plaintiff's house, described in the petition, was charged to have been insured against loss by fire, to the value of eighteen hundred dollars, for a premium then paid of thirty-six dollars.

The petition was in the usual form, averring a loss by fire, to the full amount of the policy, and a failure of defendant to pay, etc.

The defendant filed its answer to the petition, in which it set up several defenses to the plaintiff's action, among which were the following: "The defendant states that it is not true that by its policy of insurance, dated April, 18th, 1872, in consideration of the sum of thirty-six dollars, paid by plaintiff to defendant, it did insure plaintiff against loss by fire, to the amount of eighteen hundred dollars, or any other sum."

Defendant denies that it ever executed or delivered the policy, as set out in the petition. Defendant denies that plaintiff ever paid the sum of thirty-six dollars, or that it ever received such sum or any other sum for the consideration of the insurance of the property as specified in the petition, or any other property of plaintiff.

For further answer, defendant states, that on the 18th day of April, 1872, it had in the hands of its agent at St. Joseph, Mo., policies signed in blank, to be filled out and signed by said agent, who at that time was J. A. Corby, and when the same were signed by him and the premiums paid to him, the policy or policies were to become binding upon it, if delivered, and that on the said day one of these policies came into the possession of one Castle, a stranger to defendant, who signed the name of such agent to the policy, and without any authority of defendant, delivered the same to plaintiff. Defendant states, that by the terms of said policy it was not to be binding until signed by said Corby, and that at the time plaintiff obtained it, he well knew that the same was not, nor has it yet been signed by said Corby, who was alone authorized to sign the same at St. Joseph.

"Defendant denies that at the time stated in the petition, either at the date of the policy or the destruction of the property, it was worth eighteen hundred dollars, or more than eighteen hundred dollars. And for further and additional matter of defense, defendant states that said policy was issued upon the property to be occupied as a boarding house, and by the specifications contained on the face of such policy, it was stipulated, that in case the property insured became vacant and remained so, without the consent of defendant indorsed on said policy, it became void; and it alleges that a long time prior to such fire the said building became and was permitted to remain vacant without the consent of defendant, by reason of which said policy became void and of no effect."

The defendant also set up several other special matters of defense to the plaintiff's action, but which it is not necessary to set out here in order to a proper investigation of the points raised by the record of the case.

A replication was filed, putting in issue all of the affirmative averments in the defendant's answer. The answer was verified by affidavit. Afterwards the case came on for hearing, and a jury was impaneled to try the issues in the case.

The plaintiff, on his part, offered in evidence the policy of insurance sued on, and which was alleged to have been executed by the defendant. The policy was objected to as evidence by the defendant, on the ground that its execution had not been proved. This objection was sustained by the court,

and the policy excluded.

The plaintiff then introduced evidence for the purpose of proving the execution of the policy by the defendant, which evidence was to the following effect: James Grady, the plaintiff, testified that a Mr. Castle first gave him the policy; that he was with Joseph Corby in the insurance business; that he paid the \$36 mentioned in the policy; that \$20 was paid to Castle at the time he gave witness the policy; and that he afterwards paid Corby \$16, which was the remainder of the premium money. A short time after Castle gave the policy to plaintiff he saw Mr. Corby, and the latter asked witness where his policy was. Witness told him it was at home. Corby told witness to bring it up to him, -which witness did. Corby took the policy and kept it for a day or two, and then gave it back to witness, who asked him if it was all right, and he said it was. It was then that witness paid him the \$16, and he delivered the policy to witness. Witness told Corby at that time that he had paid twenty dollars of the premium to Castle, and he replied that it was all right. Witness could not read, and when Corby delivered the policy to him he thought his property was insured, and paid him the remainder of the premium money. At the time that Castle first delivered the policy to witness, Corby was not present; but Castle told witness that he and Corby were in partnership in the insurance business, and represented defendant.

Thomas Calligan testified that he was well acquainted with plaintiff, Joseph Corby, and Mr. Castle; that Corby told witness that the policy to Grady, in question, was all right; that Corby and Castle were in the same office; that to witness' knowledge Castle issued a great many policies signed just as this one to plaintiff is signed; that he issued to witness three policies for a Mr. Powers, signed just as this one is

signed—thus, "Corby—Castle"; that witness paid the premiums on these policies. Witness was here shown the report sent by Castle for Corby, to the company, and he identified the policies, reported in this report and sent to the company, as the policies issued to him by Castle, for the benefit of said Powers. Witness testified that some of the policies reported to the company by Corby were signed and issued just as this policy was signed in favor of plaintiff. Witness, on cross-examination, stated that the conversation he had with Corby about this policy was after the loss, and after Corby had ceased to be the agent of the defendant.

James Wolfolke testified that he knew Mr. Corby, and remembered the time Castle was in the office with Corby. Castle was in the habit of signing policies just as the policy to plaintiff is signed. The policies were so signed by Castle in Corby's presence in the office; they were working together. After Castle left Corby, witness acted as sub-agent with Corby. Witness knew about the burning of plaintiff's house; was acting for the defendant at that time with Corby. Witness notified the company, and they sent an agent up, who, with witness, examined into the burning of the house, and had estimates made of the value of the house, and the cost of re-building, etc. After these examinations, the special agent and witness looked in the register of the company, kept by the local agent at St. Joseph, and could not find this policy on the register. The policies spoken of by Calligan, issued for Powers, were on the register. The agent then denied any responsibility on the part of the company for the loss because the policy was not entered on the books and reported to the company.

Other witnesses testified as to the habit of Corby and Castle in issuing policies, in which Castle signed Corby's name, just as was done in the case of the policy to plaintiff, and of Corby receiving the premiums thereon.

Peter B. Castle was also examined, and he testified that he was in St. Joseph, in April, 1872, in the insurance business; was operating with Joseph A. Corby. Mr. Corby re-

presented the American Central Insurance Company of St. Louis; witness had authority from Mr. Corby to solicit insurance, and to sign his name to policies for him.

The defendant received the premiums of the policies issued by witness, and signed in the name of Corby by witness, thus: "J. A. Corby, by Castle." The printed number of the policy (handed witness) to James Grady, is 905; but the written one, as they are numbered in the office, is 201. Witness stated that he signed this policy as it is signed (Corby by Castle). Witness had authority from Mr. Corby to do so. Witness could not say that Corby ever accepted the signature so made to this particular policy; but he accepted the signature to all policies as his signature. He received the premiums paid on this policy. "I reported the policy to Corby," and it was after it was so reported that he received the premium money. This witness testified to other matters which it is not necessary to notice.

After the plaintiff had introduced the foregoing evidence to prove the execution of the policy, the court on its own motion, and against the objection of the plaintiff, sent the jury from the court room, and called and placed on the witness stand, J. A. Corby (the plaintiff at the time objecting and excepting to said action of the court).

Corby was then examined by the court, and testified that he was the agent of the company at St. Joseph, at the time this policy was issued. He denied that Grady ever paid him any of the premium money, or that he ever told Grady that the policy was all right; denied that he ever gave Castle authority to sign his name to this policy, or that he knew that this policy had ever been issued, or that he had ever reported it to his company; or that the monthly reports were made by Castle at his direction.

On cross-examination, witness Corby was asked the following questions, each of which was answered in the negative by said witness, to-wit: 1st. "Did you not, in the city of St. Joseph, a short time after the burning of Grady's house, state to Thomas Calligan, that Grady's policy was issued and your

name signed on the same by Castle at your request, and that Grady had paid you part of the premium money, or words to that effect?" 2nd. "Did you not in the Gazette office, a short time after the burning of Grady's house in the city of St. Joseph, tell H. M. Ramey that Grady's policy was all right, or words to that effect?"

The plaintiff then offered to prove by said Calligan and Ramey, that Corby had made the statements to them contemplated by the foregoing interrogatories; and thus contradict said Corby, and impeach his testimony. This evidence was excluded by the court.

The jury was then recalled by the court, and the plaintiff again offered to read in evidence the policy sued on. This evidence was objected to by the defendant, on the ground that the plaintiff had not made out a prima facie case of the execution of the policy, or of its ratification. The objection to the policy was sustained, and it was excluded as evidence in the case. The plaintiff then took a non-suit, with leave to move to set the same aside; which motion was afterwards made and overruled by the court, when the plaintiff saved his several exceptions, and brought the case to this court by writ of error.

It is true, as insisted by the defendant in this case, that an agent cannot delegate his authority to act for his principal, without special authority from the principal to do so, or unless the act of the agent, who delegates the authority, is ratified by the principal with knowledge of the facts; but this rule does not apply to mere ministerial acts to be performed by the agent. It is not necessary that the agent should do such acts in person, if he direct the act to be done, or with a full knowledge of the act, adopt it as his own, it is sufficient. (Commercial Bank &c. vs. Norton and Fox, 1 Hill, [N. Y.] 501; Bartlett vs. Palmer, 8 N. Y., 398; Seymour vs. Wyckoff, 10 N. Y., 213; Lynn vs. Burgoyne, 13 B. Mon., 400.)

The real question to be decided in this case, is, did the plaintiff introduce any evidence in the case which tended to

prove a due execution of the policy of insurance offered in evidence? If any such evidence was introduced, the plaintiff had a right to read the policy to the jury, and then it would be for the jury to decide, after hearing the whole case, what weight should be given to said evidence.

The court seems to have tried this case upon the supposition that it was the right of the court to hear evidence tending to prove the execution of the policy, and also evidence tending to contradict the evidence of the plaintiff, and then decide on the weight of the evidence and exclude the policy, and in that way to decide the very question to be submitted to the jury, which is, whether the policy was duly executed or not. This is a mistaken view of the law.

The rule is, that if there is any evidence in such case, however slight, tending to prove the formal execution of the instrument, it is held to be sufficient to entitle it to go to the jury. (2 Greenl. Ev., § 295.) The court in such case has no right to weigh the evidence; nor is the court called on to decide whether the instrument had been duly executed or not. These questions are peculiarly for the finding of the jury. All that the court is called on to decide, is, whether the plaintiff had adduced any evidence which tends to prove the due execution of the instrument.

In the case of the President, &c., of the Berks and Dauphin Turnpike Road vs. Myers, (6 Serg. & R., 11) Justice Gibson, in discussing the very question arising in this case, uses the following clear and satisfactory language: "It is necessary to premise that there is a striking difference between proof of authenticity, collateral to the issue, and offered for the purpose of introducing the deed itself, and the same proof, where the issue is directly on the fact of sealing and delivering. In the first case the court is the appropriate tribunal to decide the preliminary questions of fact; although, where the evidence is not clear, it may, and usually does, refer the consideration of these questions to the jury, with directions not to consider the deed or paper as being in evidence, if the facts should appear to be unsupported by due

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proof; but where the execution of the paper is the fact directly in issue, the jury, and not the court, is to judge of the proofs which, instead of being preliminary to the admission of other evidence to prove the issues, goes itself directly to the jury as evidence in chief of the very fact in controversy. On the plea of "non est factum," therefore, where there is a spark of evidence of sealing and delivering, the courts are bound to permit the instrument to be read; for it is not for them, but for the jury, to judge of the fact." And again, in the case of Sigfried vs. Levan, (1d., 307) Duncan, Justice, in the examination of the same subject, remarks: "A proper test would be to inquire whether, if the defendant demurred to the evidence, the plaintiff might not refuse to join in the demurrer, unless the defendant admitted on record the sealing and delivery; that is, whether there were any facts or circumstances given in evidence, from which the jury might infer the fact of sealing and delivery, not that they conclusively must. If the subscribing witness proves the execution of the bond, it is admitted. It then goes in evidence to the jury, but it does not pass to them as res judicata, for the defendant may show it to be a forgery supported by perjury. If the bond is proved by the subscribing witnesses, it is read in evidence—why? Not because the court pronounces, by admitting it in evidence, that it is the deed of the party, but because the party has given evidence of its

Testing the present case by the rules laid down in the foregoing cases, we find that Corby had the right, as the agent of the defendant, to make the contract of insurance, and to sign and issue the policy as such agent.

Grady, in his evidence states, that after he received the policy from Castle, he, at the request of Corby, returned it to Corby; that Corby, after having retained it for some days, re-delivered the policy to Grady, after being informed of the whole facts of the case, and then received the premium.

This evidence certainly tends to prove the due execution of the policy; for, if after the policy was delivered to Grady,

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it was returned by him to Corby, after a full knowledge of the facts, with his name signed to it by Castle, and if he then received the premium money—these acts on his part made the signature to the policy as much his own, and the contract of insurance as much the act of the company, as if it had then just been made and signed by him. It is true that this evidence is positively contradicted by Corby; but it has been before stated that it was not the province of the court to decide on the weight of the evidence.

There was also evidence tending to prove that policies had been returned to the company at different times signed by Castle, as the one to Grady was signed, and that the premiums had been received on the same without objection. This is evidence, though slight it may be, to prove that the company authorized or ratified the act of said Corby, in acting and transacting business for the company through a sub-

agent.

The action of the court in examining witness, Corby, against the protestations of the plaintiff to the contrary, is remarkable; for if there was no evidence tending to prove the execution of the policy, it was the duty of the court to exclude the policy as evidence. If there was evidence tending to prove the execution of the policy, it was not for the court to hear contradictory evidence and decide the case upon the weight of the evidence. The court could not in this way assume the province of the jury, and decide the only issue of fact made for their consideration by the plea of non est factum. The court, after the plaintiff had introduced evidence tending to prove the execution of the policy, had no right to hear, on its own motion, evidence disproving the execution of the policy, and thus withdraw the main issue in the case from the jury. (Scott vs. Gallagher, 11 Serg. & R., 347; Flourney vs. Warden, 17 Mo., 435.)

It may not be necessary, but I suppose it will not be improper to suggest that the plea of non est factum, and the further defense, "that said policy was issued upon the property to be occupied as a boarding house, and by the specifica-

tions contained on the face of such policy it was stipulated, etc.," might not under our statute be considered consistent defenses; at least, it may be doubted whether the defenses would be considered consistent. This is, however, only a suggestion; no opinion is expressed on that point, and no such point is made by the parties to the action.

The judgment will be reversed and the cause remanded; the other judges concur.

ROLLIN G. WHITMAN, Defendant in Error, vs. WILLIAM TAY-LOR AND CALDWELL COUNTY, Plaintiffs in Error.

- 1. Mortgagee—Ejectment against one holding under possession by—Notice of mortgage shown by fact of possession.—One holding possession under a mortgagee cannot defend his possession in ejectment brought against him by a purchaser from the mortgagor, after the execution of the mortgage, without notice thereof. And the possession of defendant and knowledge of that fact by plaintiff are not sufficient to charge the latter with notice of the mortgage. To produce that result, the instrument must be recorded, or plaintiff must have either actual notice of its existence, or information such as would put a man of ordinary prudence upon inquiry as to its existence. But the fact of such possession may be taken into consideration by the jury, in connexion with other circumstances, as going to show actual notice to plaintiff of the mortgage.
- Lands—Irregularities in judgment and execution affecting—Title of stranger thereto, not affected by.—Irregularities in the judgment and execution under which land is sold, cannot affect the title of one who is a stranger to those proceedings and has no notice of the irregularities at the time of his purchase
- 3. Land, sale of, founded on constable's nulla bona return, made in less than ninety days.—A sale of land under execution, issued on a transcript from a justice's court, is not void, collaterally, by reason of the fact that the transcript was founded upon a constable's return, made in less than ninety days from date of the execution.
- Sherif's sale not void collaterally for inadequacy of price.—Mere inadequacy
 of consideration will not, of itself, render a sheriff's sale void in a collateral
 proceeding.
- 5. Mortgages—Purchase from—Subrogation of purchaser to rights of mortgage. [The court intimated that where land is purchased of a mortgagee, and the money is used to cancel the mortgage debt, the purchaser might, in a proper proceeding, be subrogated to the rights of the mortgagee, for re-imbursement of the money so advanced.]

Error to Caldwell Common Pleas.

Crosby Johnson, for Plaintiff in Error.

I. The county, as mortgagee of the lands, had the right to hold possession as against the mortgagor and those claiming under him, after condition broken, until the debt was satisfied. (Hubble vs. Vaughan, 42 Mo., 138; 38 Mo., 120; 49 Mo., 244; Johnson vs. Houston, 47 Mo., 227.)

II. Neither the plaintiff, Davis, or the defendants in the suit, having been parties to the suit before the justice of the peace, the plaintiff cannot object to the proceedings on account of the irregularities complained of. (Winston vs. Affalter, 49 Mo., 263; Hardin vs. Lee, 51 Mo., 241; Ellis vs. Jones, 51 Mo., 180.) The objection to the process of the Circuit Court, on account of the constable's return to the execution before the justice, is not available in this action. (Murray vs. Loften, 15 Mo., 62; Morton vs. Quinby, 45 Mo., 388; Waddell vs. Williams, 15 Mo., 216; Cabell vs. Grubbs, 48 Mo., 353.)

M. A. Low, with A. W. Mullins, for Defendant in Error.

I. It has been held by this court that where there has been a defective foreclosure of a mortgage, the purchaser at the sale has sufficient color of title under the mortgage to defend ejectment against all except the mortgage and those claiming under him. (See Jackson vs. McGruder, 51 Mo., 55; Jones vs. Mack, 53 Mo., 147; Honaker vs. Shough, 55 Mo., 472.) But these cases recognize the doctrine that a stranger to the mortgage cannot protect his possession under it. (Woods vs. Hilderbrand, 46 Mo., 284.) In the case at bar, the defendant, Taylor, was a stranger to the mortgage, if any ever existed. He did not purchase at a foreclosure sale. In point of fact, there was no sale under the foreclosure proceedings.

II. The court below committed no error in excluding the deed of the sheriff of Caldwell county to Tilton Davis. This sale was under a transcript which showed that the execution, issued by the justice who rendered the judgment, was prema-

turely returned, and 2,180 acres of valuable land in Caldwell county, worth at least \$20,000, was sold by the sheriff and bought in by the attorney for the plaintiff in that judgment at the nominal sum of \$13.50 (twenty-five cents per tract). The purchaser treated the sale as a nullity and subsequently made a quit-claim deed to the same lands, for a like mere nominal amount. (See Hann. & St. Jo. R. R. Co. vs. Brown, 43 Mo., 294, and authorities cited on 5th point of the brief of Messrs. Carr, Hale & Oliver.)

Vories, Judge, delivered the opinion of the court.

This was an action of ejectment, commenced in the Common Pleas Court of Caldwell county, to recover a tract of land in the petition described.

The petition is in the usual form. The action was brought against William Taylor only, but, on his motion, the county of Caldwell was permitted to appear and become a party to the action.

The defendant, Taylor, filed a separate answer, in which he denied the allegations of the petition and also claimed that he was the owner of the land in fee.

Caldwell county also filed its separate answer, in which it, after denying the right or title of the plaintiff, as a second defense to the action, averred that on the 1st day of November, 1859, one James E. Johnson was the owner, in fee simple, of the land in controversy, and that on said day he borrowed of said defendant the sum of \$416, which belonged to the school fund of school township, No. 9, in said county; and that said Johnson, at that time, executed to defendant, for the use of said school township, his bond, by which he promised, for value received, to pay the defendant, for the use aforesaid, said sum of \$416 with interest thereon at the rate, etc., twelve months after date-which said bond was approved and filed by the County Court of said county; but that said bond was afterwards destroyed by fire, etc.; that at the time of the execution of said bond, said Johnson executed and delivered to said county a deed of mortgage, conveying to said

county the premises in question, which said mortgage recited said bond, and contained a condition to the effect that if default was made in the payment of the principal or interest due by said bond when the same became due, the sheriff of said county might, without any suit, proceed to sell the mortgaged premises or any part thereof to satisfy said bond, and make an absolute conveyance of said land to the purchaser. which should be as effectual as a sale under a judgment of foreclosure, etc.; that the said deed of mortgage was also burned and destroyed at the time the court house of said county was destroyed by fire in March, 1860; that said Johnson filled and neglected to pay the said sum of money due by said bond, or the interest thereon, when the same became due; that afterwards said county, by its agents, took possession of said land by virtue of said mortgage and delivered the possession thereof to the said defendant, Taylor; that afterwards, on the 3rd day of September, 1863, the said county commenced a suit in the Circuit Court of Caldwell countr. against said Johnson, to recover said debt and to foreclose said mortgage, and on the 5th day of April, 1866, the said Circuit Court gave judgment against said Johnson, on said bond. for \$731.36, and foreclosed the equity of redemption of said Johnson in and to said land, and ordered the same to be sold for the payment of said judgment and costs of suit; that an execution was issued on said judgment, and said lands by virtue thereof were sold, and said county of Caldwell being the highest bidder for the same, they were sold to said county for the price of \$435; and that the balance of said judgment remains due and unpaid; that on the 25th day of March, 1868, said county sold and conveyed said land to said defendant, Taylor, by deed of that date, and delivered the possession thereof to him, and that he had ever since held the possession of said land under said county, etc.

This second defense set up by the answer of Caldwell county was stricken out on motion of the plaintiff on the grounds that it constituted no defense to plaintiff's action; and that the same matters could be shown in evidence under the deni-

als in the previous part of the answer. The defendant at the time excepted.

Issues were made on the second defense set up in the answer of the defendant, Taylor.

The case was tried without a jury. It was admitted by the parties, at the trial, that the land in controversy was entered from the United States by one John A. Miller; that Miller conveyed said land to James E. Johnson, in 1858 or 1859; that Johnson, on the 19th of April. 1869, made and delivered a deed of said land to plaintiff; that if plaintiff recovers in this action, his damages may be assessed at fifty dollars and the monthly rents and profits at ten dollars.

The defendants, on their part, read in evidence, 1st, a quitclaim deed from Tilton Davis to the defendant, Taylor, for the land in controversy. 2nd, A deed made by Crosby Johnson as commissioner of Caldwell county, dated March 25th, 1868, purporting to convey said land to defendant Taylor.

The last named deed was objected to by the plaintiff on the ground that Caldwell county had no interest in said land which could be conveyed. There is nothing in the record to show that the objection was ever disposed of.

The defendant next offered in evidence a deed made by the sheriff of Caldwell county, dated the 5th day of April, 1866, purporting to convey the land in controversy to Tilton Davis as the property of James E. Johnson. This deed recites that on the 6th day of September, 1862, one Stacey Bancroft (and other persons named) before one Charles McRea, a justice of the peace for Caldwell county, recovered against James E. Johnson a judgment for \$119.38; that afterwards, on the 13th day of April, 1863-64, a transcript of said judgment was filed in the office of the clerk of the Circuit Court for said county and was then recorded and entered on the docket, etc.; that by a certificate of said justice, filed in said clerk's office, on the 13th day of April, 1863, it appears that an execution issued on said judgment, directed to the constable of the proper township, against the goods and chattels of said James E. Johnson, which execution had been returned "not satisfied, no

goods or chattels of said defendant being found," etc.; that after said return, on the 9th day of March, 1865-6, an execution was issued by said clerk on said judgment or transcript and delivered to the sheriff, etc. The deed then proceeded in the usual form.

The plaintiff objected to the introduction of this deed, and for the purpose of showing that said deed was void and inadmissible in evidence, he offered in evidence the transcript filed by the justice in the clerk's office, together with the execution which had been issued thereon by the clerk of said Circuit Court and the return thereon, by which it appeared that the judgment was rendered by the justice, on the 6th day of September, 1862; that an execution was issued thereon on the 8th day of September, 1862, returnable in ninety days; that the execution was returned on the 5th day of December, 1862, showing that no property had been found by the constable on which to levy and make the money; wherefore, the execution was returned not satisfied. It also appeared by the recitals contained in the execution issued by the clerk; that the judge ment had been rendered by the justice as it is hereinbefore stated, and that on the 13th day of April, 1863, a transcript of said judgment was filed in the office of the clerk of the Circuit Court of Caldwell county and recorded, etc.; that by the certificate of the justice, filed in said clerk's office on the 13th day of April, 1863, it appears that an execution issued on said judgment, directed to the constable of Rockford town ship, against the goods and chattels of said James E. Johnson, which said execution has been returned "not satisfied, no goods and chattels having been found whereon to levy the same. These are therefore to command," etc., "that if the goods and chattels," etc. The execution then concludes in the usual form.

The return on the execution shows that the sheriff levied on a number of tracts of land by virtue of said execution, including the land in controversy. It is also stated by the sheriff, in said return, that the plaintiff's attorney, Tilton Davis, directed the levy to be made, and that the property was sold,

and said Davis, plaintiff's attorney in said case, became the purchaser and receipted for the money made by the sale of the property.

The defendant objected to the introduction of said transcript, execution and return, as evidence in the cause; and his objection being overruled he excepted. The court thereupon excluded the sheriff's deed so offered in evidence by the defendant and he again excepted.

The defendant then offered and read in evidence, a certified transcript of a judgment rendered in the Circuit Court of Caldwell county which said judgment purported to have been rendered in a case wherein Caldwell county, to the use of school township, No. 9, in said county was plaintiff, and James E. Johnson, was defendant. In this judgment it is found that there is due from defendant Johnson to plaintiff, the sum of \$731.36, and for the purpose of securing said debt said Johnson, on or about the first day of November, 1859, executed and delivered to plaintiff a mortgage in due form of law, conveying to plaintiff certain lands therein described, the same being the lands now in controversy; after which the judgment proceeded in the usual form, for the said sum above found to be due and to foreclose the equity of redemption in said Johnson in said land, and ordered the same to be sold, etc. The plaintiff, at the time, objected to the introduction. of said transcript. This objection being overruled he excepted.

It was then admitted that the defendant, Taylor, was put into the possession of said land by said county. The defendants then offered in evidence several tax deeds by which the property in controversy purported to be conveyed to Tilton Davis. These deeds were excluded by the court, and the defendant excepted; but as no particular point seems to have been made in this court in reference to their exclusion, it will not be necessary to further set out their contents or purport.

Neither party asked for any declarations of law.

The court found the issues for the plaintiff and rendered judgment in his favor for the possession of the premises and

for the damages and rents and profits, as agreed on by the parties, in case of a finding for plaintiff.

The defendant filed a motion for a new trial, setting forth, as cause therefor, the rulings of the court excepted to. This motion being overruled, the defendants excepted, and appealed to this court.

The first ground relied on, in this court, by the defendants, for the reversal of the judgment is, that the Circuit Court erred in striking out the second defense set up to the plaintiff's action, by the answer of the defendant, Caldwell county. It is insisted, by the defendants, that the part of the answer stricken out, sets up a good defense to the plaintiff's action; that a mortgagee who is in possession either by himself or by others who hold under his authority, can successfully defend himself, in his possession, in an action of ejectment, even against the owner of the equity of redemption.

This proposition is generally true where the question arises between the mortgager and the mortgagee, or those holding possession under the mortgagee, and where a forfeiture has taken place and the mortgage debt still remains unpaid. (Hubble vs. Vaughn, 42 Mo., 138; Honaker vs. Shough, 55 Mo., 472.)

In the case now under consideration, however, the plaintiff is not the mortgagor, but is admitted to be a purchaser from the mortgagor long after the execution of the mortgage to Caldwell county. There is no allegation in the answer, that the mortgage was ever recorded, or that the plaintiff had notice in any other way, of said mortgage. It was certainly necessary that the answer should have averred either that the mortgage was recorded or that the plaintiff had notice thereof at the time he purchased the land from the mortgagor. (Rhodes vs. Outcalt, 48 Mo., 367; Shumate vs. Reavis, 49 Mo., 333.)

It is insisted, by the defendant, that as it is admitted that defendant, Taylor, was in possession under the county of Caldwell, therefore it was not necessary that the plaintiff should have had notice of the mortgage, that the fact of the posses-

sion was sufficient to charge him with notice. This position is not tenable. There is no averment in that part of the answer stricken out, that the plaintiff knew that Taylor was in possession at the time of his purchase, and if there had been it would not have been sufficient. Under our statutes the mortgage should have been recorded or the plaintiff should have had actual notice of its existence, or of facts sufficient to lead to a knowledge of the fact by ordinary diligence, before he can be charged with notice. The fact that the land was in the possession of Taylor was evidence which, when taken with other circumstances, might authorize a jury to find that the plaintiff had actual notice of the mortgage, but still the fact of that notice was one to be found by the jury. (Beatie vs. Buller, 21 Mo., 313; Maupin vs. Emmons, 47 Mo., 304; Speck vs. Riggin, 40 Mo., 405; Vaughn vs. Tracy, 22 Mo., 415; Rhodes vs. Outcalt, 48 Mo., 367.) For the reasons aforesaid, the court committed no error in striking out the second defense in the answer of the defendant, Caldwell county.

It is next insisted in this court that the Circuit Court also erred in excluding the deed offered in evidence by the defendant, purporting to be the deed of the sheriff of Caldwell county conveying the land in controversy to Tilton Davis, the same having been levied upon and sold to said Davis as the property of James E. Johnson, long before the sale of the land to plaintiff by Johnson, by virtue of an execution and judgment against him, which said judgment had been rendered by a justice of the peace, and a transcript thereof filed in the clerk's office as directed by the statute.

It is not insisted that the sheriff's deed to Davis was deficient in its recitals, or that it was insufficient in its form to pass a title to the land, to the purchaser; but the plaintiff, in order to sustain his objection to the deed, offered in evidence the transcript of the judgment filed by the justice in the clerk's office, by which it appeared, by an entry made by the justice at the conclusion of his judgment, that an execution had issued on the 8th day of September, 1862, and was made returnable in ninety days, and which was delivered to John Wright, con-

stable, and then a further entry is made, to the effect that the execution was returned on the 5th day of December, 1862; that no goods or chattels were found, on which to levy and make the money, and the execution was therefore, returned not satisfied. Each of these entries was signed by the justice, and the judgment, with these entries, was certified by the justice.

The plaintiff also offered in evidence, the execution and return thereon, under which the land in question had been sold to said Davis, and upon which sale, the sheriff's deed was predicated. There was a memorandum made at the conclusion of the entry of the levy made on the execution, which memorandum purported to be the act of the sheriff, by which it appeared that the levy was made at the request of T. Davis, attorney for plaintiff. The sheriff also filed, with his return, a receipt purporting to be the receipt of said Davis as attorney for the plaintiff, for the money made on the execution. There was no proof made of the execution of the receipt. This entry, made by the sheriff, and the receipt of said Davis were offered to charge the attorney of the plaintiff who purchased the land with notice of all irregularities in the execution and sale, so as to avoid the sheriff's deed in the hands of said attorney in consequence of said irregularities. The evidence of the said entry and receipt was objected to by the defendant on the ground that the entry, so made by the sheriff. not having been made in a discharge of a duty imposed by law and the execution of said receipt not having been proved, they were incompetent evidence to prove that Davis was the attorney of the plaintiff in the execution.

The evidence was not competent for the purpose intended; at least, the execution of the receipt should have been proved to have made it competent evidence. But it could make no difference in this case, as the defendant, Taylor, who claims to have purchased this land from Davis, is a stranger to the judgment and execution, and it is not pretended that he had any notice of any irregularities in the execution, if there are any, at the time that he purchased the interest of Davis in

the land; so that the sale, as it now stands, is to be treated as a sale to a stranger under the execution.

It is contended, that from the entry on the transcript from the justice's docket, filed in the clerk's office, it appears that the execution, issued by the justice, was made returnable in ninety days, when it further appears that it was returned on the 89th day after the day of its date, and that a sale made under an execution, issued upon such transcript, would therefore be void and confer no title on the purchaser. This position I think is not correct. It is true that in the case of Dillon vs. Rash (27 Mo., 243), it is held that where the execution issued to the constable, in such case, is returned before the return day thereof, it is not sufficient to authorize the clerk to issue an execution on the transcript filed, and that where in such case the clerk has issued an execution, it will be quashed on motion for that purpose; but Judge Scott, who delivered the opinion of the court in that case, remarked: "We are not prepared to say that a sale under an execution, founded on a return like that in the present case, would be regarded as a nullity in a collateral action, where the interests of third persons were involved."

In the present case the rights of third persons are involved and the irregularity cannot avail in this collateral action. It is true that the entries on the justice's transcript are not as full as they ought to be; but they are substantially sufficient to authorize the issue of the execution by the clerk. While the irregularity might be sufficient to quash the execution issued, or a sale made under it, if a motion for that purpose had been made in time; yet where the property has got into the hands of an innocent purchaser, under a sale and sheriff's deed, made under such an execution, the execution not being absolutely void, the purchaser's title cannot be defeated in this collateral way. (Waddle vs. Williams, 50 Mo., 216; E. H. Norton, guardian, vs. Quimby, 45 Mo., 388; Ruby vs. Hann. & St. Jo. R. R. Co., 39 Mo., 480.)

It is also insisted that it appears that the land in question was sold at sheriff's sale for a mere nominal sum, and that the

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court ought, therefore, not to uphold the sale. This, also, might avail, with other facts, in a direct proceeding to set aside the sheriff's sale and deed made in pursuance thereof, for some misconduct or fraud on the part of the sheriff or parties concerned. The smallness of the consideration does not, of itself, make the sheriff's deed absolutely void, so that it could be disregarded in a collateral proceeding. It follows that the sheriff's deed to Davis, was improperly excluded.

It is also claimed by the defendant that the court erred in excluding the deed purporting to have been executed by a commissioner of the county of Caldwell, conveying the land in controversy to defendant, Taylor. There is nothing in the bill of exceptions, to show that said deed was either read or rejected by the court; and if there were, there is nothing in the record showing any title in the county which it could convey. If it is true, as charged, that by a sale to Taylor, by the county, by virtue of a mortgage from James E. Johnson, said Taylor paid the consideration, and it was applied in payment of the mortgage debt against Johnson, in a proper case for that purpose, Taylor might be subrogated to the rights of the county, under the mortgage, to re-imburse him the money so advanced, but no such case is now before us.

For the reason that the sheriff's deed was improperly rejected, the judgment will be reversed and the case remanded; the other judges concur.

SAMUEL BUTCHER, Plaintiff in Error, vs. Thomas Rogers, Defendant in Error.

Ejectment—Chain of title through common source.—In ejectment where both trace title through the same source neither need go further back.

Deeds—Terms. "grants, bargains and sells" amount to quit-claim, when.—A
deed which "grants, bargains and sells all the right, title and interest" of the
grantor is merely a quit-claim conveyance and inoperative to convey an after
acquired title.

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Error to Carroll Circuit Court.

Murat & Musterson, for Plaintiff in Error.

L. H. Waters, with Hale & Eads, for Defendant in Error.

Sherwood, Judge, delivered the opinion of the court.

Ejectment for lands in Carroll County. The title of the plaintiff was as follows:

"A deed from John Butcher to plaintiff, executed Nov. 15th, 1869, recorded Nov. 24th of that year; a deed of general warranty for a portion of the land in question, and quitclaim deed for the residue thereof, executed by Chas. Hager and wife to John Butcher. March 12th, 1860, and recorded April 7th, 1864; a title bond from Chas. Hager and wife to John Butcher for the land sued for, executed May 3rd, 1859, and recorded the next day. Upon this bond there was indorsed an assignment dated Sept. 10th, 1861, by John Butcher to plaintiff which was recorded Dec. 27th, 1869, and by agreement of parties, this assignment is to be considered as a deed from John Butcher to plaintiff.

The defendant's title consisted, first, of a deed for the land in suit, from Thos. Parsley to defendant, executed Feb. 20th, 1865, and filed for record the 23rd of that month; (this deed grants, bargains and sells "all the right, title and interest" that Parsley and wife have in the premises in dispute, and contains a recital in these words: "their title being a sheriff's deed, said land being sold as the property of John Butcher, to satisfy an execution in favor of Austin Shine") and, second, of a deed for the land in controversy "made, acknowledged and delivered at the March Term, 1865." by the sheriff of Carroll County, to Thos. Parsley and duly acknowledged, but not recorded. This deed was not in existence, but secondary evidence was resorted to to supply this deficiency, showing the contents of the deed and that the property therein described was sold to Thos. Parsley as the property of John Butcher, under a special execution in favor of Austin Shine.

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By the agreement of parties filed in this court, it is conceded that Austin Shine attached the property in litigation in March, 1863, as that of John Butcher, and under a judgment rendered in that year, in that cause, the attached property was sold at the March Term, 1864; there is no stipulation, however, as to the time when the deed to Thos. Parsley was made by the sheriff, and we are left to the record to ascertain when this deed was executed.

- 1. It is evident that plaintiff and defendant both claim title through the same common source, John Butcher. This is apparent from the deeds offered in evidence by plaintiff, and by those offered on behalf of defendant—the deed to the latter from Parsley expressly reciting that the title thereby conveyed was derived through sheriff's sale of John Butcher's land. Under such circumstances it was entirely unnecessary for plaintiff to trace a chain of title back to the Government.
- 2. The deed from Parsley to defendant, as before stated, and as shown by briefs of counsel on either side, as well as by the bill of exceptions, was executed February 20th, 1865. This deed was in effect a mere quit-claim deed and inoperative to pass an after acquired title. (Gibson vs. Chouteau's Heirs, 39 Mo., 536 and cas. cit.; Bogy vs. Shoab, 13 Mo., 365.) As this was the case, the title acquired by Parslev, defendant's grantor at the March Term, 1865, as shown both by the record and statement of counsel, could, by no possibility, enure to the benefit of defendant; and he therefore showed by the evidence which he adduced at the trial no defense whatever to plaintiff's action. For this reason the declaration of law given at the request of defendant, that plaintiff was not entitled to recover, was erroneous. This point has not been raised by counsel, but it is patent of record, and we are not at liberty to pass it by in silence. It may be that there has been a mis-recital of dates; if so, counsel have only themselves to thank for the bungling manner in which this record has been transcribed.

Judgment reversed and cause remanded.

State v. Brown.

STATE OF MISSOURI, Respondent, vs. WILLIAM A. BROWN, Appellant.

Crimes and punishments—Attempt to wound, main and disfigure—Constr. Stat.
 —A felonious "maining, wounding and disfiguring" (Wagn. Stat., 450) is "another felony" as contemplated by § 32. And a felonious assault with intent to maim, etc., is an assault to commit a felony and so an offense under the statute. (State v. Thompson, 30 Mo. 470.)

Appeal from Harrison Circuit Court.

Neal & Lewis, for Appellant.

I. The phrase "other felony" in § 32 has no reference to the maining, wounding, etc., mentioned in § 33. Hence an attempt to wound, etc., etc., is not a statutory offense within § 33, which does not refer to "attempts" to commit the offense specified. Moreover, the offenses mentioned in § 32 are of higher grade than those embraced in § 33. But the punishment in both is the same. Why should this be so if the latter section includes not only the offense but the attempt to commit it? If such were the design of the legislature, then the attempt and the overt act would be punished alike, for § 33 prescribes no lesser grade of punishment in case of "attempted "maiming, wounding," etc. "Other felony" means unmentioned offenses of the higher grade alluded to in § 32, and not to those contained in the next section. Hence the motions to quash and in arrest should have prevailed. (13 Am. Law Reg., U. S., 522; St. Louis vs. Laughlin, 49 Mo., 559; Grumley vs. Webb, 44 Mo., 474; Sedgw. Stat. and Const. Law, 423; Landeman vs. Black, 17 B. & Cress., 96.)

Jno. A. Hockaday, for Respondent.

I. The defendant is charged with committing a felonious assault with intent to "maim, wound, or disfigure" which is a felony under §§ 32, 33. This court has repeatedly held that a felonious maiming or wounding is a felony. (State vs. Thompson, 30 Mo., 470.)

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WAGNER, Judge, delivered the opinion of the court.

The indictment contains two counts. The first charged the prisoner with making an assault with intent to kill, and the second charged him with an assault with intent to maim, wound and disfigure.

There was a motion to quash the second count on the ground that it charged an offense unknown to the law. The motion was overruled. The defendant was acquitted on the first count, and convicted on the second; and whether that count charged an offense under the statute is the only question in the case.

By the statute (Wagn. Stat., 450, § 33) the maiming, wounding or disfiguring of any person is made a felony. The same statute (§ 32) punishes all assaults made with intent to kill or to commit any robbery, rape, burglary, manslaughter or other felony.

The indictment in the second count charged the defendant with having made a felonious assault, with intent to maim, wound and disfigure. As a felonious maiming, wounding or disfiguring is a felony, the defendant was there charged with an assault to commit a felony. The indictment was within the language of the law. (State vs. Thompson, 30 Mo., 470.)

No question arises upon the instructions. The court gave three for the State which were not objected to. Two were given for the defendant and another one was refused; but it is not copied in the bill of exceptions, and nothing is known in regard to it.

The judgment will be affirmed; the other judges concur.

STATE OF MISSOURI, Appellant. vs. The Hannibal & St. Joseph Railroad Company, Respondent.

1. Revenue, railroad—Hann. & St. Jo. R. R.—Sworn statement of president, assessment on basis of—Act of 1852 providing such basis of taxation not a contract with State—Assessment by Board of Equalization constitutional.—Under § 3 of the act of Sept. 20th, 1852, it became the duty of the president of the Hannibal & St. Joseph R. R. Co. to furnish an annual statement under oath to the State auditor, showing the actual value of the railroad property, from which statement that officer shall assess the railroad State tax: Held that this provision did not amount to a contract between the State and company which rendered invalid the act of March 10th, 1871, (Sess. Acts 1871, p. 56.) subjecting the road to assessment for taxation by a special board of equalization; and the latter act, so far as inconsistent with the former, repealed it.

Appeal from Buchanan Circuit Court.

J. A. Hockaday, Ally. Genl., for Appellant.

I. The provisions of section three of the act of September, 1852, providing for the payment of a tax by the Hannibal & St. Joe. R. R. Company and for the mode of assessment, constituted no such vested right in the company as to preclude the legislature from providing some other mode of assessment.

II. The act of March 10, 1871 (Sess. Acts, 1871, p. 56) providing for assessment and equalization of taxes of all the railroads in the State by a special board, composed of the auditor, treasurer and register of lands, repeals or invalidates that part of the act of Sept. 20th, 1852, which provides for the valuation of the property of respondent, by the president of the Hann. & St. Joe. R. R. Co. (Bailey vs. The Pac. R. R. decided by the U. S. Sup. Ct. in March, 1875, not yet reported.)

James Carr, for Respondent.

I. The original charter of the respondent, by which the stock, and through it the property of respondent, "is exempt from all State and county taxes," is a contract, valid and binding between the appellant on one side and the respondent on the other. (Binghampton Bridge, 3 Wend., p. 74; Dart-

mouth College vs. Woodward, 4 Wheat., 519; State Bank of Ohio vs. Knott, 16 How., 369; Jefferson Branch Bank vs. Skelly, 1 Black, 436.)

There was and is valuable and sufficient consideration for this exemption from all State and county taxes. The respondent's railroad is the pioneer railroad in the State. "This State and the United State shall have the right in time of war to use said road in transportation of troops or munitions of war, in preference to all other persons." (§ 19, p. 9 of charter.) There was no railroad in this State at the time of granting said exemption. The building of the Hann. & St. Joe. R. R. has added hundreds of millions of dollars to the taxable property of the State, and in this way has more than re-paid the State tenfold for the exemption. (See State Bank of Ohio vs. Knott, 16 How., 369; Dodge vs. Woolsey, 18 Ohio, 331; Jefferson Branch Bank vs. Skelly, 1 Black, 436.)

If there were any other consideration necessary for this exemption from all State and county taxes, it is contained in the act of congress entitled "an act granting the right of way to the State of Missouri and a portion of the public lands to aid in the construction of certain railroads in said State" approved June 10th, 1852, as follows: "That there be and is hereby granted to the State of Missouri for the purpose of aiding in making the railroads aforesaid, every alternate section of land designated by even numbers for six sections in width on each side of said road. Provided that the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever." (§§ 1, 2, p. 14 of charter.) "And the said railroads shall be and remain public highways for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States." (§ 4, 1d.) "That the United States mail shall at all times be transported on said railroads under the direction of the post-office department at such price as congress may by law direct." (§ 6 Id; State Bank of

Ohio vs. Knott, 16 How., 369; Dodge vs. Woolsey, 18 Ohio, 331; Jefferson Branch Bank vs. Skelly, 1 Black, 436; Home of the Friendless vs. Rowse, 8 Wal., 430; Washington University vs. Rowse, 1d., 439; Wilmington R. R. Co. vs. Reid, 13 Wal., 264; Gordon vs. Appeal Tax Court, 3 How., 133; McGee vs. Mathis, 4 Wal., 142.)

II. Even if there was no contract by virtue of the act of 1852 exempting the respondent from all State and county taxes or modifying the exemptions as herein laid down, still the special act of September 20th, 1852, is not repealed by the act entitled "An act to provide for a uniform system of assessing and collecting taxes on railroads." Approved March 10th, 1871. A late statute which is general and affirmative does not repeal a former which is particular, unless negative words are used, or unless the two acts are irreconcilably inconsistent. (State ex rel. Vastine vs. Judge of St. Louis Probate Court, 38 Mo., 529, and authorities there cited; N. Y. & Erie R. R. Co. vs. Sabine, 26 Pa. St. R., 244; City of St. Louis vs. Alexander, 23 Mo., 483.) There is nothing in the act of March 10, 1871, under which the appellant claims the right to tax the respondent, which repeals the act of September 20th, 1852, either by direct words or even by implication. (Sess. Acts, 1871, p. 56.)

There have been repeated decisions of this court, holding that the respondent is not taxable in any other way, or for any other tax than the one specified in the third section of the act of September 20th, 1852.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff for the purpose of recovering a balance of State taxes assessed for the year 1872, against the defendant.

The defendant appeared and demurred to the petition upon the ground that the company was not liable for the taxes because they had been illegally assessed. This demurrer was sustained by the court and a final judgment was rendered thereon and the plaintiff appealed.

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It appears that this controversy grows out of an assessment made for the year 1872 by the special board of equalization on the defendant's road and other property. That board adjusted and equalized defendant's taxable property and placed a valuation on the same of six millions, eight hundred and ten thousand, eight hundred and sixty dollars which was duly certified to the auditor. On this amount the taxes found due were, to the state revenue fund, thirteen thousand, six hundred and twenty-one dollars and seventy-two cents; and to the state indebtedness fund, seventeen thousand and twenty-seven dollars and fourteen cents, making a total of \$30,648, 86. Of this sum defendant paid \$25,326.27, leaving a balance of \$5,322.59 which is the amount sued for.

The ground now taken by the defendant is that the special board of equalization had no authority to make the assessment; that the charter of the company points out the only mode by which taxes could be assessed against it, and that, therefore, the action of the board was void.

The act to provide for a uniform system of assessing and collecting taxes on railroads, approved March 10, 1871 (Sess. Acts 1871, p. 56) enacts that all railroads now constructed, in course of construction, or which shall hereafter be constructed in this State, and all other property, real, personal or mixed, owned by any railroad company or corporation, shall be subject to taxation, etc. The second section declares that on or before the first day of February in each and every year, the president or other chief officer of every railroad company whose road is now or which shall hereafter become so far complete and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the State auditor a statement duly subscribed and sworn to by said president or other chief officer, before some officer authorized to administer oaths, setting out in detail all the property of said company, including the road-bed, buildings, machinery, engines, cars, lands, workshops, depots, and all other property of whatsoever kind, with the location thereof and the actual value thereof in each county in cash. The 5th section con-

stitutes the State Auditor, State Treasurer and the Register of Lands a special board of equalization of railroad property, and gives them the same powers and authorizes them to discharge the same duties with reference to railroad property as the State Board of equalization with reference to all other property. Section six provides that the board shall meet at the office of the State Auditor on the first Monday in May in each and every year, and requires the auditor to lay before the board all returns which shall have been made in accordance with the provisions of the law. The seventh section regulates the manner of proceeding in the valuation, adjustment and equalization of the property. This was the law under which the board acted in making the assessment.

On September 20th, 1852, an act was passed to give the defendant the benefit of the donation of lands made by congress in the same year. This act was accepted by the defendant and in the third section is the following: "In consideration of the grants and privileges herein conferred upon said company, the said company shall, on the first Monday in December in each year after said road is completed, opened and in operation, and declares a dividend, pay into the treasury of the State a sum of money equal to the amount of the State tax on other real and personal property of like value for that year upon the actual value of the road-bed, buildings, machinery, engines, cars and other property of said company, which shall be as a consideration to the State for the execution of the trust reposed in the State by an act of congress of the United States, approved June 10, 1852, entitled 'an act granting the right of way,' etc., and for the purpose of ascertaining the value of the same it shall be the duty of the president of said company on the first day of February in each year after said road is completed, opened and put in operation, and declares a dividend, to furnish to the auditor of the State a statement under his oath, made before and certified by some officer authorized to administer oaths, of the actual value of the road-bed, buildings, machinery, engines, cars and other property of said company; and from said statement so fur-

nished the auditor shall charge said company with the amount appearing to be due the State, according to the statement furnished, as herein required, by the president of said company * * * * * Provided that if said company shall fail, for the period of two years after said road shall be completed and put in operation, to declare a dividend, then said company shall no longer be exempt from the payment of said sum in this section required to be paid into the State treasury on the first Monday of December in each year, by said company, nor from the forfeitures and penalties in this section imposed."

That the period has arrived in which the money is due the State is not disputed; but it is insisted that the mode pointed out in the section just referred to, for making the return and fixing the valuation amounts to a contract that no other steps should be taken, or course pursued, and that the legislature was incompetent to alter this contract or impair its force.

To support this position the case of the Hann. & St. Joe. Railway vs. Shacklett, (30 Mo., 550) is cited and relied on as a case in point and as determining the precise question in favor of the defendant. But this is an entire misapprehension. No such point was raised or decided in that case. The county of Marion had proceeded under the general revenue law to assess a State, county and asylum tax on all the property of the defendant, real and personal, situated in that county.

The validity of this assessment was before the court and it was held that it was illegal, that the charter exempted the property of the company from county taxes, but that under the act of Sept. 20, 1852, the property of the company was subject to taxation in the manner provided for in the third section of the last named act. Napton, J., in delivering the opinion said: "At the expiration of two years from the completion of the Hann. & St. Joe. Railroad, the roadbed, ma chinery and all the property of this company, employed in the operations of the road, are expressly subjected to a tax, the amount of which is to be regulated by the general revenue law of this State, and the mode of its assessment and collec-

tion is specifically pointed out." With this language I concur entirely. Whilst that mode remained alone, and no other was in existence it constituted the sole and only manner the State possessed of collecting the taxes. But it is nowhere intimated that there was no authority for changing the procedure and adopting different regulations for the assessment and collection of the taxes.

The case of the Hann. & St. Jo. R. R. vs. Shacklett was followed in this court in the case of the State vs. Hann. & St. Jo. R. R. Co., (37 Mo., 265) upon a similar state of facts; but in neither case was the question now under consideration presented or decided.

This very question was recently before the Supreme Court of the United States in the case of Bailey vs. The Pacific Railroad (not yet reported). The same claim was made by the company there that is contended for here.

The act in relation to the Pacific road contains this provision: "The said Pacific Railroad and the said Southwestern Branch Railroad shall be exempt from taxation respectively until the same shall be completed, opened and in operation, and shall declare a dividend, when the road-bed, buildings, machinery, engines, cars and other property of such completed road, at the actual cash value thereof, shall be subject to taxation at the rate assessed by the State on either real or personal property of like value; and for the purpose of ascertaining the value of the same, it shall be the duty of the president of said company on the first day of February in each year after such road is completed, opened and put in operation, and declares a dividend, to furnish the auditor of the State, a statement under his oath, made before and certified by some officer authorized to administer oaths, of the actual value of the road-bed, buildings, machinery, engines, cars and other property appertaining to said completed road; and from said statement so furnished the auditor shall charge said company with the amount appearing to be due to the State, according to the statement furnished, as herein required, by the president of the company. Provided, that

if the said company shall fail, for the period of two years after said roads respectively shall be completed and put in operation, to declare a dividend, then said company shall no longer be exempt from the payment of said tax, nor from the forfeitures and penalties in this section imposed."

In answer to the argument that this was a contract, and that the State was precluded from resorting to any other mode of assessing and collecting the faxes, than that provided for in the above section, the Supreme Court say: "It is claimed, however, that even if this be so, the State is inhibited from altering the special provision on the subject of State taxation. This provision prescribes a mode for ascertaining the tax due the State. The president of the company is required to furnish to the auditor a statement, under oath, of the actual cash value of the property to be taxed, on which the company is directed to pay the tax due the State, within a certain time to the treasurer, under penalties. And the claim is that the State Legislature is prohibited from passing any law to assess the property of the company for taxation for State purposes in a different manner. It is not so written in the statute; nor, indeed, can any proper inference be drawn from what is written that the legislature intended to contract with the corporation in this particular. It would be strange, indeed, if it were so; for the mode of assessment might not work well, and yet if it formed the subject of a contract, it could not be changed. This value was the basis of taxation, and it could not be a matter of moment how it was fixed, provided it was done correctly. In this result both the State and the corporation had an equal interest. Both were interested in the means adopted only so far as they were efficient to secure the contemplated object. The exigenev of the State required the revenue on the basis of actual value, and this, it is to be presumed, the corporation was willing to accord. At any rate it was the duty of the State, in justice to other property owners, to use the appropriate means to ascertain this value. The ordinary method of doing this is by the instrumentality of officers appointed for the

purpose; but the State asked the railroad, through its president, to make the valuation, to which the corporation assented. This way of reaching the result was less expensive to the State, but more expensive to the corporation, than the usual mode in which taxes are assessed. The president of the company could not make a true valuation without the expenditure of time and labor, and this repeated year by year, as values of property continually fluctuate. There is no presumption that he would not do it, conscientiously, according to his best judgment, but still it was a favor to the State for him to do it at all, and certainly no one can contend that a State cannot waive at any time a provision for its own benefit. Apart from this view of the subject, the provision in question was simply a mode for ascertaining the true value of the property to be taxed; and, if, on the trial, it should turn out not to be the best mode for the purpose, surely the legislature has the right to change it and adopt another. This no one will question, unless the legislature has surrendered its power over the subject by contract, which, in our opinion, has not been done in this case."

This language is clear and emphatic, and as a correct exposition of the statute ought to be regarded as conclusive. In the mode pointed out for the assessment and collection of the taxes on defendant's property there are none of the characteristics of a contract. It is a simple regulation by which the result may be ascertained and arrived at; but there is nothing to inhibit the adoption or substitution of any other, if it should be deemed advisable or advantageous. The rights of the company are in nowise interfered with. The actual valuation of the property is the primary object sought to be attained, and the only question is, how that shall most surely be accomplished.

All that the law attempts is to create a board which will equalize all property and place the actual value upon it. This is carrying out the requirement of the constitution, and is fair to the company and fair to the State. If any injustice is attempted by the board, the law affords ample remedy by

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which their action can be reviewed and any wrong corrected But there is no allegation of that kind in the case. The institution of the board-was legal and their assessment was authorized. The State having adopted in part a different mode from that contained in the act of 1852, and this being, in some respects, wholly inconsistent with that act, the latter mode, so far as the inconsistency goes, must prevail.

The judgment therefore should be reversed and the cause

remanded; the other judges concur.

RICHARD B. STURDEVANT, Respondent, vs. Martin Rehard, et al., Appellants.

Practice, civil—Pleadings, onus probandi.—Where the answer specifically denies the allegations of the petition, the burden is on plaintiff to prove them and the fact that defendant sets up certain equities as an independent defense does not shift the onus on defendant as to those allegations.

Appeal from Caldwell Circuit Court.

Dunn & Johnson, for Appellants.

Hoskinson & McLaughlin, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action of ejectment. Defendants answered separately. Each answer contained a specific denial of every allegation in the petition, and one of the answers, as an independent defense, set up certain equities, to which a replication was filed. In this state of the pleadings the court held that the burden of proof was cast upon the defendants, and as they introduced no evidence, judgment was given for the plaintiff. As every allegation in the petition was denied in both answers, and as the plaintiff gave no evidence, whatever, to prove his cause, it is not perceived on what grounds the judgment can be sustained.

Judgment is reversed and cause remanded; the other judges concur.

ALBE M. SAXTON, Plaintiff in Error, vs. CITY OF St. JOSEPH, Defendant in Error.

 St. Joseph, charter of.—Liability for street improvement.—Under the charter of St. Joseph, the city could not be held liable, in any manner whatever, for work done which was made a charge upon adjoining property.

2. Municipal corporations, concurrence of mayor and council necessary to bind -Street improvements-Claim of contractor against adjoining proprietors; against city, for work ; for expenditures in attempt to collect claim-"Ignorantia legis."-The adoption by a city council of a resolution, ordering the city engineer to let out a contract for macadamizing, etc., a street, without the concurrent action of the mayor, is a nullity, imposing no legal obligation whatever upon the municipality, and gives the contractor no right of action against the adjoining property owners. Nor will the city be liable to him for expenditures in endeavoring to enforce the collection of his tax bills against itself. The principles of law that govern cases of illegal or imperfect execution of municipal powers, or cases where an absolute duty is imposed upon the corporation, have no application to the state of facts supposed. For a municipality cannot act at all except through the mayor and council, and the propriety of improving a street is a matter resting in the sound discretion of its officers. Moreover, the contractor must be held to know the law, and will be presumed to know that his claim is invalid.

3. Municipalities—Liability for negligent performance of work—Rule as to, not applicable to defective legislation.—The rule, that when a city undertakes the execution of public work authorized by its charter, though it is not bound to undertake the same, it is liable for negligence in the performance of such work, does not apply to defective municipal legislation.

Error to Buchanan Circuit Court.

Allen H. Vories, for Plaintiff in Error.

I. Under the amended charter of the city of St. Joseph she was authorized to macadamize her streets, and the general power was conferred; but the specific mode pointed out was by ordinances. (See Saxton vs. Beach, 50 Mo., 488; Rev. Ord. St. Jo., 1869, p. 8, § 10.)

II. If the defendant, in directing the macadamizing, had passed an ordinance, instead of adopting a resolution, for that purpose, she would have been exempt from any liability to be sued; and having complied with her charter the plaintiff would have had his remedy over against the property owner for the work done. (See Saxton vs. Beach, *supra*; City of St. Loñis vs. Clemens, 52 Mo. 144, 145; Fisher vs. City

of St. Louis, 44 Mo., 482, 483; Wetmore vs. Campbell, 2 Sanf., 341, 351.)

III. But, failing to pass an ordinance, plaintiff had no remedy against the property owner, under § 5 of the Act of February 8th, 1865. (Laws & Ord. St. Jo., 47-8.) And defendant was under obligation to give plaintiff a remedy over for the work done, or make itself "liable in a civil action for the damages resulting to individuals from its neglect to perform the duty required." (See Dil. Munic. Corp., §§ 764-778, with cases cited; City of St. Louis vs. Clemens, supra.)

IV. Under the charter of defendant she had the full and general power given "to open, alter, abolish, widen and extend, establish, grade, pave, or otherwise improve and keep in repair streets, avenues, lanes, drains and sewers;" and there was, under said charter, a further provision that macadamizing streets "should be paid for by assessing the costs of same on the property benefited." (Rev. Ord. City St. Jo., 1869, p. 8, § 10, pp. 47, 48, § 5.) But the power in a municipal corporation to make local improvements, though the expense be directed in the charter to be assessed upon the property benefited, gives the corporation implied power to make general contracts therefor-and failing to comply with the special terms of the charter, which would make the improvements bear the burden of paying by assessment, the corporation itself becomes responsible for the costs of the work. (See Dil. Munic. Corp., § 648; Cummings vs. Mayor of Brooklyn, 11 Paige C. R., 596; Fisher vs. City of St. Louis, supra; Wetmore vs. Campbell, supra.)

J. T. Baldwin, with Doniphan & Reed, for Defendant in Error.

I. The street improvements, for which the plaintiff in error attempts to recover in this action, were made or pretended to be made in pursuance of sections 4 and 5 of "An Act to amend the charter of the city of Saint Joseph," approved February Sth, 1865. (Rev. Laws and Ord. City of St. Jo. Mo., 1869, pp. 47, 48.) Said improvements were not ordered in

the mode prescribed by charter, i. e. by ordinance, but by resolution, which was a nullity. (Saxton vs. Beach, 50 Mo., 488.) The cost of such improvements is clearly required to be assessed against the property benefited; and the City of St. Joseph is expressly exempted by charter from any liability whatever for any work done, which is to be paid for as provided in said § 5, which is the only mode prescribed for the payment of macadamizing, guttering, etc. Had the council attempted to bind the city, by contract, to pay for such work out of the general fund, such act would have been ultra vires. How then can the city become impliedly liable upon a quantum meruit? (18 Wis., 228; 2 Kas., 370; 1 Dil. Munic. Corp., § 381.)

II. Assumpsit may be maintained against a municipal corporation in certain cases upon an implied promise; but the better opinion is that a promise to pay can never be implied where the corporation has no power to contract. (1 Dil. Munic. Corp., §§ 384, n. 1; 386, n. 1; 31 Ia., 381; 13 Pick., 343; 14 Me., 25; 30 Me., 157, 160; 13 Me., 293: 13 Gray, 347.) Where the corporation orders local street improvements to be made, for which the abutters are the parties ultimately liable, and which, by the charter, must be made by a prescribed mode, if made without any contract, or without a valid one, the doctrine of implied liability does not apply in favor of the contractor, unless indeed the corporation has collected the amount from the adjoining owners and has it in the treasury. (1 Dil. Munic. Corp., §§ 383, 384; 16 Cal., 255; 2 Cliff. C. C., 590, 596; 12 Wall., 1; 2 Black, 478.)

III. Where a statute creates a liability which did not before exist, and gives a special remedy to enforce it, that remedy and not a common law remedy, must be pursued. (17 Ind., 169; 35 Mo., 334; 2 Dil. Munic. Corp., §§ 653, 656, 759, 784; 43 Me., 322; 5 Ohio St., 20; 6 Mass., 40; 1 Met., 130; 14 Iowa, 296.)

IV. Municipal corporations are liable for acts done in what is known as their private or corporate character, or from which they derive some special or immediate emolument; but not as

to those done in their public capacity as governing agencies in the discharge of duties imposed for the public good or general benefit. (2 Dil. Munic. Corp., §§ 764, 765; 44 Mo., 479.)

V. Where the charter or incorporating act requires the officers of the city to award contracts to the lowest bidder, a contract made in violation of its provisions or requirements is illegal; and in an action brought on such contract for the work, the city may plead its illegality in defense. (1 Dil. Munic. Corp., § 388, and n. 1; 48 Mo., 17.)

VI. A person entering into a contract with a municipal corporation, for the performance of work on the streets thereof, to be paid by assessment on the district benefited, is bound at his peril, to examine the records, at the city clerk's office, to see whether the preliminary steps, required by the charter, have been taken. (24 Barb., 427; 2 Kas., 357; 12 Mich., 279; 16 Ind., 13; 1 Dil. Munic. Corp., §§ 401, 402; 13 Ind., 245.)

Hough, Judge, delivered the opinion of the court.

The question presented by this record for our determination, is the sufficiency of the following petition:

"Plaintiff states that defendant is now and has been for ten years last past, a municipal corporation, in the State of Missouri, organized under and by virtue of the laws of the State of Missouri, and that said defendant, by virtue of its charter and laws, has and has had power by ordinance to macadam. pave, curb, gutter, and otherwise improve the streets of said city; that about February, 1868, said defendant ordered the city engineer of said city to let out contracts for macadamizing, guttering, paving and curbing Sylvania street, from 8th street to the alley between Twelfth and Thirteenth streets in said city, and ordered by a resolution of said city council, said street to be macadamized, paved, curbed and guttered; that in obedience to said order, the city engineer of defendant, and in pursuance of said order, contracted with Peter Young and Frank Oberdorf to do said work, and who went on under their contract, to perform the said work in said contract mentioned, and completed the same about the first day of March, 1868,

and which said work was accepted by said engineer, in discharge of said contract; that one James T. Beach and Sarah Beach, at the time said work was done, were and still are the owners of lot 8 in block 25 in Smith's addition to the city of St. Joseph, Missouri, and said lot fronts on Sylvania street, between 8th and the alley between 12th and 13th streets in said city; that under the charter of said defendant and its ordinances, the cost of doing the said work was to be assessed on the lots, fronting on said street, in proportion to the front foot, etc.; that after said work was done, defendant's engineer assessed the cost of said work against said lot including cost of alley and street crossings at \$433.00 altogether, and made his bills to that purport, and which said bills from their date, about March 1, 1868, bear interest at fifteen per cent. per annum, and delivered the same to said Young and Obendorf; that they, about May, 1868, assigned all their interest in said claims and demands to plaintiff. Plaintiff further says that about July, 1868, he commenced a suit in the Buchanan Circuit Court, afterwards by change of venue prosecuted in the Buchanan Court of Common Pleas, Missouri, against the said Beach, to recover judgment on account of said work so done, in which said last named court this plaintiff recovered a judgment on the - day of December, 1871, for the sums of \$608.75 and \$79.74, in all \$788.49; that said defendant appealed from said judgment to the Supreme Court of the State of Missouri, where, at its August term, 1872, the said judgment was reversed and set aside, upon the ground that defendant had ordered said work done by a resolution of its council, instead of an ordinance, and that plaintiff, by reason of the failure of said city, could not recover for said work done; that plaintiff, in said court below and in said Supreme Court, had to lay out and pay out, as costs and expenses incurred in and about said suit, the sum of \$250; that demand has been made upon defendant, by plaintiff, to pay to plaintiff said sum so due him and said costs so paid, but defendant has failed to pay the same or any part thereof. Wherefore, plaintiff says that an action hath accrued to him to recover of said defendant said amount aforesaid, and for which plaintiff asks judgment."

To this petition the defendant demurred on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer and rendered final judgment thereon, and the plaintiff brings the case here by writ of error.

This court held in the case of Saxton vs. Beach (50 Mo., 438), that the resolution of the common council of defendant, ordering the work to be done, was a nullity; that if the work could have been ordered at all by resolution, it could only have been ordered by a resolution passed by both the mayor and the council; that the council could no more act alone in the premises, than the mayor could, himself act, without the concurrence of the council. The city charter declares that the city shall not be liable, in any manner whatever, for or on account of any work done, which is made a charge upon the adjoining property, fronting upon the work done. Plaintiff, having failed to collect the amount of his tax bills from the property owners, and having no recourse against the city, now seeks to recover the sum expended by him in testing the validity of the resolution of the common council, under which the work was done.

The theory of the plaintiff's case seems to be, that as the city had undertaken to order the work to be done, on account of which the tax bill was issued, and had so imperfectly and illegally executed its purpose, as to give to the contractor, and to plaintiff, as his assignee, no right of action against the property, which would have been liable, but for the fault of the city, and in consequence thereof, he had fruitlessly expended the sum of \$250 in attempting to collect said tax bill, that the city is liable to him in damages to that amount.

According to our view, the city never attempted to act in the premises. It could only act in such matters by its mayor and council. The act of the council alone was not the act of the city. The letting of the contract by the engineer, and the acceptance of the work by him, and the issuance of the tax bill, would have been as valid and binding without the resolution of the common council, as those acts were with it.

There was no action whatever, imperfect or defective, on the part of the only officers who were authorized by the charter to act for and bind the city in the premises. This action, therefore, would seem to be, in reality, an effort to hold the city liable for the failure of its mayor and council to order the work to be done, which the council alone, attempted to direct to be done.

From all that appears in this case, the city was under no legal obligation to the plaintiff, or the contractor, or the public, to order this work to be done. (Mills vs. The City of Brooklyn, 32 N. Y., 495, et seq.) That was a matter resting in the sound discretion of its mayor and council, and a question in which neither the contractor nor the plaintiff had any interest, at the time, so far as appears from the face of the petition.

In the case of Clayburgh vs. City of Chicago (25 Ill., 535), an action was sustained against the city for neglecting and wilfully refusing to collect an assessment levied to compensate the plaintiff for damages sustained by reason of opening a street over his lot; but, in that case, the duty imposed was absolute and perfect, was not discretionary or judicial, and was one owing to the plaintiff.

Nor is the case at bar analagous to that of Fisher vs. The City of St. Louis (44 Mo., 482), cited by plaintiff, the facts of which it is not necessary to recite here. But it may not be out of place to remark, that the case of Wetmore vs. Campbell (2 Sandf., 350-1), cited by Judge Currier in support of Fisher's right to recover in that case, arose upon statutes authorizing the corporation of the city of New York to construct sewers in either of two methods; first, they could have an estimate and assessment of the probable expense made, confirmed and collected, and then proceed to the execution of the work; or, second, they could execute the work at their own expense, and after its completion, and when the actual cost was ascertained, they could assess the same, with the charges, upon the houses and lots benefited, and collect such assessments as before. In that case, by the terms of the contract and under the law, a corporate liability was incurred to the contractor.

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Nor do we think the doctrine, that although a city is not bound to undertake the execution of all public work authorized by its charter, yet where it does do so, it will be liable in damages to those injured by the negligent manner in which such work is performed, by its agents and servants, can be held to apply to defective legislation.

Besides, every one is conclusively presumed to know the law, and, as the plaintiff was chargeable with knowledge that his tax bill was invalid, the city cannot be held liable for the useless expenditure made by him in his effort to enforce its collection. That was an investment, the loss of which must be borne by himself.

The judgment of the Circuit Court is affirmed; all the judges concur, except Judge Vories, not sitting.

WILLIAM H. PORTER, Respondent, vs. THE HANNIBAL AND St. Joseph Railroad Company, Appellant.

1. Damages—Personal injuries by railroad to servant, caused by defective track—Duty of company to keep track safe.—In suit against a railroad company by an employee, for personal injuries caused by defective track, an instruction declaring defendants exempt from liability, notwithstanding its unsafe condition, if plaintiff knew, or could by the exercise of ordinary diligence have known, of the state of the track, is properly refused. It is not the business of the servant to ascertain whether the machinery and structure of the road are defective; but the duty of the company is to keep them in a safe condition; and it is responsible for injuries resulting from such defects.

Appeal from Buchanan Circuit Court.

STATEMENT OF CASE.

The facts charged in the petition were that plaintiff was a young man of nineteen, enployed as a brakesman by defendant, and that in consequence of the unevenness of a switch side track, he was thrown from a car and run over, and his leg was crushed.

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Oliver, and Carr, with Leach, for Appellant.

I. If a servant is injured by the negligence or fault of his fellow servant, though the one injured is subject to the orders of the one in fault, no action can be maintained against the master. (McDermott vs. Pac. R. R. Co., 30 Mo., 116, 117; Farwell vs. Boston & W. B., 4 Metc., 49; Redf. Railw., § 131, et seq., 4th ed., p. 517, and notes 1 & 2; Gibson v. Pac.R. R. Co., 46 Mo., 167.) So, if in this case the yard master carelessly or negligently ordered respondent to brake on the track where he was injured, appellant is not liable. (1 Whart. Negl. §§ 229, 230.)

II. Where an employee is injured in consequence of defective machinery, or other appliances of the road, he cannot recover against his employer upon the ground of negligence in respect to such defects, and if he knew of the existence of the same, or could have known thereof by the exercise of ordinary care or prudence, it was a question proper to be submitted to the jury. (Whart. Negl., §§ 214, 217.)

Allen H. Vories, for Respondent.

I. The defendant was bound to provide good, safe and properly constructed tracks and machinery, adapted to the carrying on of its business, and to use all reasonable care and ordinary precaution for the safety of plaintiff—and the degree of care required is greater when life and limb are endangered. (See Cayzer vs. Taylor, 10 Gray, 274; Loomis vs. Terry, 17 Wend., 496; Castle vs. Duryea, 32 Barb., 480; Morgan vs. Cox, 22 Mo., 373; Ryan vs. Fowler, 24 N. Y., 420; McDermott vs. Pac. R. R. Co., 30 Mo., 115; Gorman vs. Pac. R. R. Co., 26 Mo., 441; Gibson vs. Pac. R. R. Co., 46 Mo., 163; Kennedy vs. N. M. R. R. Co., 36 Mo., 361; Col. & Ind. Cent. R. R. Co. vs. Arnold's Adm'rs, 31 Ind., 174–180.)

II. It was not the duty of plaintiff, nor in his power to know, the defects in the track, "by the exercise of ordinary care on his part." (See Snow vs. Housatonic R. R. Co., 8 Allen, 441; Seaver vs. Boston & Maine R. R. Co., 14 Gray, 466; Gibson

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vs. Pac. R. R. Co., 46 Mo., 163; Devitt vs. Pac. R. R. Co., 50 Mo., 302; Brothers vs. Cartter & Co., 52 Mo., 372; Gibson vs. Pac. R. R. Co., 46 Mo., 69.)

NAPTON, Judge, delivered the opinion of the court.

The judgment in this case must be reversed, because the petition alleges the minority of plaintiff, and the appointment of a next friend by the Circuit Court of Buchanan county, which allegations are denied in the answer, and no proof was offered on the subject. The point was raised in the Circuit Court by a demurrer to the evidence.

The question in regard to cumulative evidence becomes unimportant in this view of the case, as upon a new trial the defendant can of course introduce his newly discovered evidence.

We have examined the instructions in this case, and see no objection to them. The third instruction asked by the defendant, was modified properly. As it stood, it exempted the defendant from liability, notwithstanding the unsafe condition of the track, if the plaintiff knew the condition of such track, or could by the exercise of ordinary diligence have known it. The court struck out the last paragraph, and, we think, properly.

It is not the business of the servant, nor has he the means of ascertaining whether the machinery or structure, upon which he is employed to operate, is defective. It is the duty of the employer to furnish these appliances; and if he fails to do so, he is responsible for injuries resulting from defective machinery. (Gibson vs. Pac. R. R., 52 Mo., 372.)

There seems to be no question in the case in regard to fellow employees. The petition and the evidence under it were based solely upon the employment of plaintiff on a defective, dangerous and improperly constructed track.

Judgment reversed, and cause remanded.

Elliott v. Secor and Evans.

WILLIAM H. ELLIOTT, Appellant, vs. SILAS L. SECOR, and JOHN EVANS, Respondents.

 Practice, civil—Withdrawal of a defence pleaded.—The right of a defendant to withdraw one of his defences at any time is unquestionable.

Parol evidence as to technical terms in a deed.—Where terms are used in a deed
that require explanation to those unfamiliar with the business to which they
pertain, parol evidence in regard to them is proper, although the terms are
not ambiguous.

Appeal from Clinton Circuit Court.

A. W. Mullins, J. E. Merryman, J. F. Harwood, and Charles Ingle, for Appellant.

S. H. Corn, with Wm. Henry, for Respondents.

NAPTON, Judge, delivered the opinion of the court.

This was a suit to recover possession of a "first breaker and finisher," sometimes called a "roll machine," alleged to have been wrongfully taken and detained by defendants.

The petition contained the allegations required by the statnte in regard to such actions.

The answer contained the usual formal denials of all the allegations of the petition and then proceeded to set up as a special defense, that the property in question had been, by mistake, included in a certain deed of trust, under which plaintiff had purchased, and asked that this deed be reformed and made to conform to the intention of all the parties to it. Subsequently the defendants, by leave of the court, abandoned this part of their answer, containing this special matter of defense; and the case was tried upon the petition and its denial by answer.

The description of property conveyed by the deed of trust was as follows: "A lot of woolen machinery as follows: one set of carding machines as follows; one first breaker and one finisher; one spinning-jack, 160 spindles, etc., now in the town of St. Catherine in Linn County, Missouri, etc." This deed was signed by the defendants and W. P. Doak, who then lived in Cameron, and was the owner at that time of the "first breaker and finisher" sued for.

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The deed was written by a lawyer, Mr. Brownlee, whose deposition was read in the case. No witnesses were examined except the plaintiff and defendants and Doak and Brownlee.

The examination of the plaintiff and defendants and Doak related chiefly to the meaning, among manufacturers, of the words "one set of carding machines," and there was no difference of opinion expressed. According to all these witnesses, who are men of experience in woolen manufacturing, a "set of carding machines," includes three pieces, one "first breaker," one finisher and a condensor. A "roll machine" consists of one first breaker and a finisher. The latter is chiefly used for making custom rolls, and is generally called a first breaker and finisher, and sometimes called a roll machine. The former is chiefly used for manufacturing cloth.

The deposition of Brownlee for the plaintiff, who drew up the deed of trust at the plaintiff's instance was to the effect that he understood that all the parties designed that the first breaker and finisher now sued for, should be included in it; that it was his intention to so include it, and that he did so include it in the enumeration of the articles conveyed, and that he also included two lots in the town of Cameron; that he drew up the paper by following a memorandum handed to him by the defendants.

This memorandum was afterwards given in evidence by the defendants and was the list of articles sold by the plaintiff to the defendants, the purchase money for which the deed of trust was made to secure. This memorandum was as follows: "One set of carding machines; one first breaker and finisher; one spinning-jack, etc., etc."

This property, thus sold by the plaintiff and bought by the defendants, was in the town of St. Catherine; but the "first breaker and finisher" sued for, had never been in that place, but was then in Cameron and owned by Doak.

After hearing the evidence the court declared the law as follows: "Although it is proper to exclude all the verbal testimony in the case, so far as it tends to vary the terms of the deed of trust in evidence, or to show the intention of the

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parties thereto, at variance with the meaning of the terms of said instrument, or to show mistakes in drafting the same; yet it is proper to consider all the evidence in the case tending to show or explain what is meant or generally understood by the terms one set of carding machines' among and by men of experience in running and dealing in woolen machinery, and also all the evidence tending to identify the property included in the terms of said deed according to their true meaning."

Nine instructions were asked by the plaintiff, none of which were given. It is unnecessary to insert them, as they merely embodied in the shape of instructions the points now made for reversing the judgment.

The right of the defendants to abandon one of the defenses in their plea cannot be questioned—the right to amend implies the right to abandon. It is obvious, from the copy of the deed of trust, appended to the original answer, that the defendants were misled by an error in the copy; but whether they were so misled or not, they had an undoubted right to abandon this defense. (Boatmen's Sav. Inst. vs. Forbes, 52 Mo., 201.)

This case was tried by the court, without a jury.

The declaration of law made by the court contained the principles of law by which the court would be guided in its finding; and this declaration was clearly right and applicable to the facts in evidence.

One of the principal exceptions taken during the trial by the plaintiffs was to the admission of the memorandum of the property sold by the plaintiffs to the defendants and handed to the defendant at the time of the sale.

It will be observed that much of the evidence given in the deposition of the draftsman, Brownlee, and by the plaintiff in his examination was incompetent; but it does not seem that the plaintiff could have been at all prejudiced by this memorandum, seeing that it merely was in rebuttal of illegal testimony given by the plaintiff. This paper, in truth, is a mere copy, almost word for word, of the descriptive part of the

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deed of trust, and it has a strong tendency to show that the deed was drawn after it, and of course conveyed only such articles as were named in the bill of sale.

It is stated in the bill of exceptions that the memorandum from which the deed of trust was drawn was agreed to be sent up to this court, from which I infer that this memorandum or bill of sale from plaintiff to defendant is the same memorandum furnished to the draftsman, as it is the only one in the record.

The admissibility of this evidence is, however, a point not material, for, whether admitted or excluded, the result must have been the same; and it is impossible, from the instruction or declaration of law given by the court, to say that it had any influence whatever on the verdict of the court. I incline to think that the evidence was competent, as tending to identify the property detailed in both papers.

It is clear that Mr. Brownlee, the lawyer who drew up the deed of trust, is totally mistaken in his deposition. It is probable, or rather certain, that he could not have had the deed before him, when he gave his deposition, as he was manifestly wrong in regard to the two lots which he thought were also included in the deed. He was equally sure that the two articles in suit were also inserted; but the deed, as it is copied in the record, contains nothing whatever concerning any lots, and contains only one "first breaker and finisher;" and comparing it with the bill of sale or memorandum of the articles sold by plaintiff to defendant, no other conclusion can be reached than the one to which the Circuit Court arrived.

Besides, all the property enumerated in the deed is described as then being in the town of St. Catherine and it is agreed by all the witnesses that the property now claimed by the plaintiff was then in Cameron, in the possession of Doak, and had been for several years previously.

There was no ambiguity in the deed. Terms were used that needed explanation to those unfamiliar with machinery of this character, and evidence was properly admitted on this

subject, and also to identify the property described, which might have applied to the articles sued for, then at Cameron, or to the articles sold to defendant then at St. Catherine.

It is difficult to see upon what grounds the plaintiff claims an estoppel in this case. It is said that the defendant's acquiescence in the sale, under the deed of trust, at which they were present, and their consent that the purchase money should be credited on their notes, estopped them from claiming or setting up any title to the articles now sued for because they were included in the deed of trust and were therefore sold to plaintiff.

This reasoning seems to be what the logicians term reasoning in a circle. The defendants did not object to the sale nor to the purchase by the plaintiff of all the articles included in the deed of trust; but they retained possession of the articles now sued for, because they were not sold, as they insisted, and this suit was brought by the plaintiff to recover that possession.

As to the offer of the plaintiff at the trial to return the property replevied, if the defendants would pay the balance due on their notes, it was entirely foreign to any issue in the case, and a matter with which the court trying the issues had no concern.

The judgment must be affirmed; the other judges concur.

Andrew Mahan, et al., Appellants, v. Elmore Waters, Respondent.

 Promissory note—Readiness to pay at time and place designated—Effect of— Money must be brought into court.—The readiness of the maker of a promissory note to pay the same at the time and place appointed, will stop interest from that time. But to avail himself of this defense upon trial, he must deposit the money with the clerk of the court.

2. Promissory note—Readiness to pay—Subsequent demand and refusal must be only for principal—Must be pleaded.—Where the maker of a promissory note is in readiness to pay the same at the time and place designated for payment, and the maker is in default, the latter may show a subsequent demand and refusal; but the demand must be for the precise sum due at maturity, and the

facts must be pleaded. If the demand is for the principal and interest since accrued, it will not operate as a demand and refusal after tender.

Promissory note—Tender, admits what ?—A plea of tender admits the existence of the debt.

Appeal from Caldwell Circuit Court.

Dunn & Johnson, for appellants, cited in argument Berthold v. Reyburn, 37 Mo., 586; 2 Pars. Contr., 642, 645, 5th Ed.; 2 Greenl, Ev., 600.

J. M. Hoskinson, for Respondent.

Hough, Judge, delivered the opinion of the court.

This was an action brought by the plaintiffs as payees, against the defendant as maker of a promissory note for eighty dollars, dated May 30th, 1872, payable in six months from date, at the Breckenridge Express Office, with ten per cent. interest from maturity, and an attorney's fee of ten per cent., if said note should be placed in the hands of an attorney for collection, by reason of its non-payment.

The defendant alleged in his answer that the consideration of the note was a sewing machine, and an undertaking on the part of the plaintiffs, to instruct some member of the defendant's family, how to use the same; that plaintiffs failed to give any instructions whereby the defendant was damaged in the sum of twenty dollars, and the consideration of the note had failed to that extent.

For a further defense the defendant alleged, that on the day the said note became due, he went, with the purpose of paying the same, to the Breckenridge Express office, where it was made payable, and called on the express agent for the note, informing him that he had come with the money to pay it; that said agent informed him that said note was not there; and defendant averred that it was not there for sometime after it became due, and claimed to be relieved of interest, costs and attorney's fee, and the further sum of \$20 for partial failure of consideration. The answer further stated that the defendant brought the money into court and was willing to pay what was justly due on said note.

Plaintiffs, in their petition, stated the consideration of the note sued on to be a sewing machine, and, in their reply, denied all the allegations of defendant's answer.

The defendant testified to an engagement on the part of the agent himself, made at the time of the sale of the machine, to give instructions as to its use, once every week or ten days for the period of six months, but there was no testimony whatever of any undertaking by the plaintiffs, or either of them, in person, or by the agent on behalf of the plaintiffs, to give such instructions, or of any authority to the agent to so bind them.

He further testified that he called at the express office at the maturity of the note, for the purpose of paying the same, but it was not there.

The express agent testified in substance, that he first received the note for collection, on the 3rd day of February, 1873, and returned it February 15th, 1873. He received it again March 3rd, 1873, and returned it March 22nd, 1873, unpaid; and while it was in his possession the first time, the defendant expressed his willingness to pay it, if he would deduct the interest, but tendered him no money. Witness informed defendant that he had no authority to make any deduction; and stated further that he had no recollection of the defendant having called to see him about the note prior to February 3rd, 1873, though he might have done so.

There was testimony by the agent as to his agreement to give instructions, and as to the instructions given by him; but this need not be noticed.

It does not appear that any money was brought into court by the defendant.

The instructions asked by the plaintiffs and refused by the court, which the plaintiffs here insist should have been given, were based upon the idea, that it was the duty of the defendant, when he called at the express office to pay the note at its maturity, and found it was not there, to make a formal tender, to the express agent, of the amount of the note, unless there was a waiver of such tender by the agent.

The only instruction given by the court at the instance of the defendant, submitted to the jury the question of a partial failure of consideration, arising from the alleged failure of the plaintiffs to perform their undertaking to give instructions as to the use of the machine.

The court of its own motion gave the following instructions: "If the jury believe from the evidence that defendant on the day of the maturity of the note sued upon, called on the express agent, at the express office at Breckenridge, and inquired for the note and offered to pay it, and was informed that no such note was there, and also that said note never was sent to said express office, until February after it became due, then in making up their verdict, they will not allow plaintiff interest on the note for the time intervening between its maturity and the time of its presentment to defendant and demand made for payment by the express agent."

There was a verdict and judgment for the plaintiffs for sixty dollars, from which they have appealed to this court.

The plaintiffs' instructions requiring the jury to find that a tender had been made to the express agent were founded upon a misconception of the law applicable to the case.

If it were a proper case for a tender, the mere fact that the note was made payable at the express office, did not authorize the express agent to receive payment thereof; and a tender to be good, must have been made to some one who was authorized to receive payment of the note. But it is the duty of the holder of a promissory note, payable at a fixed time and at a particular place, to have it there so that it may be paid by the maker when it becomes due, and if it be not at the designated place of payment at its maturity, and the maker be ready and offer to pay at the time and place appointed, he may plead such facts as he would plead a tender, and bring the money into court, not in bar, of course, of the action, but in bar only of the damages and costs. (Caldwell vs. Cassidy, 8 Cowen, 271.)

This rule is not affected by our statute on the subject of tender. To avoid a plea of tender, the plaintiff may show a

subsequent demand and refusal, but the demand must be of the precise sum tendered. (Berthold vs. Reyburn, 37 Mo. 586.) The same rule would seem to be applicable to a case like the present, where no formal tender is required. The defendant's readiness to pay at the time and place appointed, would have the effect of stopping the interest from that time, and when demand was afterwards made of him to pay the note with the interest which had accrued since the offer to pay, with knowledge that in consequence of such offer the defendant was only bound to pay the amount due on the note at the time of its maturity, such demand would not operate as a demand and refusal after tender. Moreover, to let in evidence on this subject there should be a plea by the plaintiff in avoidance of the facts set up by the defendant, to relieve himself of damages and costs. Here the replication was a general denial only of the facts alleged in the answer, and contained no plea of a subsequent demand and refusal. On the other hand the defendant, in order to avail himself of his readiness to pay at maturity, must bring the money into court; that is, he must deposit it with the clerk, and his plea will be held to be bad, unless he does so deposit it. This he has not done. But the law is, also, that a plea of tender admits the existence of the debt, and insists only on the fact that there has been an offer to pay. (2 Greenl. Ev., § 600.) Here the defendant seeks to avail himself of the benefits of his readiness to pay the note at maturity, which stands, as it were, in lieu of a tender, and endeavors, at the same time, to reduce the amount of the demand he thereby admits to be due. He cannot do both.

In accordance with the foregoing views, we hold, that the court rightly refused the instructions asked by the plaintiffs, and erred in giving the instruction asked by the defendant, as well as the one given of its own motion.

The judgment will be reversed and the cause remanded. All the judges concur except Judge Vories, who is absent.

McDonald & Co. v. Fist, Jr.

R. L. McDonald & Co., Respondents vs. Israel Fist, Jr., Appellant.

Attachment—Plea in abatement—Overruling of—Answer waives exceptions to.
 —Defendant, in an attachment suit by answering over waives exception to the

action of court in overruling his plea in abatement.

2. Judgment notwithstanding answer—Bill of exceptions need not contain motion for—Judgment may appear in transcript in ordinary form.—Where judgment is given notwithstanding the answer, the action of the court may be reviewed, although the judgment is in the usual form and silent touching the answer, and although the motion for judgment is not embraced in the bill of exceptions. (The motion may have been ore tenus.)

Appeal from DeKalb Circuit Court.

M. E. Low, for Appellant.

J. D. Strong with B. & V. Pike, for Respondents.

Sherwood, Judge, delivered the opinion of the court.

This was a proceeding by attachment, the affidavit being based upon that section of the statute which authorizes process of that character, when articles contracted to be paid for on delivery, are not thus paid for.

The action of the court in striking out the several pleas in abatement it is not necessary to review, as any exceptions to that action were waived and abandoned by the answer subsequently filed, which, in substance, alleged that a portion of the goods sold had been paid for, in full, prior to suit brought; and that as to the residue of the goods sold, they were sold on thirty days time, which had not expired at the institution of the suit. These allegations were not denied.

The bill of exceptions shows that the court, on motion of plaintiffs, gave judgment in their favor, "notwithstanding the answer." This ruling was clearly erroneous, as the answer set up a good defense. And it is immaterial that the judgment, as it appears in the record proper, is silent as to the action of the court in the particular referred to, and appears to be in the usual form. Nor is it material that the motion of the plaintiffs which led the court to treat the answer as a nullity, is not incorporated in the bill of exceptions. This mo-

Hosea & Co. v. Cross, et al.

tion may have been ore tenus; but in any event and whatever may have been the grounds of that motion, it was evident error to entirely ignore and disregard the allegations of the answer, which, if established by testimony, would have precluded the plaintiffs from a recovery, so far as the then pending action was concerned.

Judgment reversed and cause remanded; all the judges concur.

Lemon Hosea & Co., Appellants, vs. Charles W. Cross, et al., Respondents.

Note lost after appeal from justice—Affidavit not required—Constr. Stat.—
Where a note, sued upon before a justice of the peace is lost after appeal taken to the Circuit Court, the affidavit of loss, contemplated by the statute (2 Wagn. Stat., p. 81, § 10), is not required.

Appeal from Caldwell Circuit Court.

Murat Masterson, for Appellants, relied on German Sav. Bk. vs. Kerlin and Joseph Marks (53 Mo., 382).

J. M. Hoskinson, for Respondent.

Sherwood, Judge, delivered the opinion of the court.

During the pendency of this cause in the Circuit Court, the promissory note, sued on before the justice of the peace, was lost, and because of the refusal of the plaintiffs to file an affidavit of such loss, in the manner required by § 10, p. 814, Wagn. Stat., the court dismissed their suit.

An affidavit, alleging loss of the instrument sued on, is one of the requirements of the section referred to, where suit is instituted before a justice of the peace; but it by no means follows that an affidavit is necessary, if the loss occurs after the case goes by appeal to the Circuit Court. (German Savings Bank vs. Kerlin, 53 Mo., 382.)

Reversed and remanded; all the judges concur.

JOHN McAllen, et al., Respondents, vs. CEPHAS P. WOOD-COCK, Appellant.

- Execution—Sale of land owned by corporation under—Purchase by Treasurer
 —Title acquired not adverse to company.—Where under execution against a
 corporation, land held by its trustees was purchased by one who was stockholder and treasurer of the company, it was held that the purchase must be
 regarded as having been made for the benefit of the association, and that the
 title which he acquired could not be considered as hostile to the company.
- 2. Practice, civil—Joinder of co-plaintiff against his consent—When proper.—In suit against a corporation, where a trustee was made co-plaintiff without his knowledge and against his consent, and prayed a dismissal as to himself on that ground: Held, that although he might have been joined as co-defendant, yet it was not error in the court to overrule the motion, and retain him as plaintiff, on the execution by his co-plaintiffs of a bond to indemnify him against costs.

Appeal from Buchanan Circuit Court.

B. Loan, for Appellant.

A. H. Vories, for Respondents.

Napton, Judge, delivered the opinion of the court.

This was an ejectment, brought by the trustees of "The North Prairie Farmers' Institute" to record a tract of land in Andrew county.

The petition is in the usual form. The defendant denied that there was any such corporation as the "North Prairie Farmers' Institute," and alleges that said corporation, created by an act of the General Assembly in 18—, had ceased to exist by reason of the failure of the stock-holders to elect trustees, etc., for ten years prior to the institution of this suit. The answer denies that McAllen, etc., are trustees or have been since 1863. The answer further denies that plaintiffs are the owners or entitled to the possession of the real estate sued for. The answer further denies that this suit is brought by the real parties in interest.

A replication was filed to this answer. The case was removed to Buchanan county where the court found for plaintiffs

The bill of exceptions showed that James Duncan, one of the plaintiffs, appeared in court and asked the court to dismiss said cause, so far as it related to him; that the suit was commenced without his knowledge and against his consent. But the other plaintiffs objected to this and insisted on their right to use his name, and then gave a bond to indemnify him against costs, and the court thereupon refused to dismiss the suit, so far as Duncan was concerned.

Subsequently, the only dispute seems to have been whether the plaintiffs were successors of the original trustees. rious records of the board were read to establish this. plaintiffs, it may be here observed, are John McCallon (or McAllen), William Wade, James Duncan, Miles Haile and Daniel C. Thomas. Wm. K. Debord, a witness for plaintiff, produced a book alleged to be a record of the proceedings of the corporation, and stated that the book had been in the custody of the secretary of the association, until the secretary moved to Nebraska, and in possession of himself since. A deed from Singleton and wife to Wm. L. Butts, Josiah B. Depart, William Wade, Wm. K. Debord and John B. Colton, trustees of the North Prairie Farmers' Institute and their successors in office, for the land in controversy, was read. Objections were made to said deed because no title was shown in Singleton, nor possession, at the date of said deed. These objections were overruled and the deed read. The deed is an ordinary conveyance of three acres of land, described by metes and bounds, dated March, 1859.

This witness Debord further stated that there was a subscription list by the members of the board, which he supposed was in possession of defendant, as he was collector and treasurer of the board in 1859, and recognized the above grantees as trustees in 1859. Here the defendant was summoned as a witness, who stated that he did not have the subscription list, as stated by witness Debord; that if he ever had anything of the kind, it was a mere memorandum of the subscription.

The witness Debord then proceeded to state that Collier, Hays, Haile, Tate, McAllen, Singleton, etc. were subscribers

to the association at twenty dollars a share. Defendant attended the meetings of the trustees, of which he was treasurer and D. C. Thomas was generally secretary. A meeting was held in 1863, when witness acted as chairman and Thomas as secretary. Duncan, Wade, Thomas, McAllen and Haile were appointed trustees. Defendant was at the meeting.

There was some dispute there as to Debord's signature to the minutes of this meeting in 1863; but it is not material whether Debord signed his name, or the secretary for him.

The plaintiffs then read from the book heretofore referred to and introduced by the witness Debord, the following entry: "North Prairie Farmers' Institute, December 3, 1859 .-At a regular meeting of the stockholders of the above named institute, on the day above mentioned, Wm. L. Butts being chairman by virtue of a former election, the following proceedings were had: Daniel C. Thomas was appointed secretary; on motion of Wm. L. Butts, Wm. McAllen was appointed secretary. On motion of Wm. L. Butts, Wm. Mc-Allen was appointed one of the trustees, William K. Debord was elected another trustee. On motion of D. C. Thomas, Wm. L. Butts was elected another trustee. On motion of Hays, Dysart was elected another trustee, and on motion of McAllen, George Morriss was also elected a trustee." A great number of objections were made to this evidence, but overruled.

The plaintiffs then read the following entry: "North Prairie Farmers' Institute, December, 1859. At a meeting of the Board of Trustees, held at the institute on the day of the above date, William L. Butts, Wm. McAllen, Wm. K. Debord and George Morriss being present, Wm. K. Debord moved that Wm. L. Butts be appointed president, and Daniel C. Thomas was elected secretary; Cephas P. Woodcock was elected treasurer. Cephas P. Woodcock was appointed to superintend the repair of the building. Cephas P. Woodcock was further ordered to complete the well fit for use. On motion the meeting was adjourned sine die.—Wm. L. Butts, president; D. C. Thomas, secretary." Similar objections were made to this entry.

The plaintiffs then read the following: "On the 11th day of December, 1859, the trustees of the North Prairie Farmers' Institute met according to notice by said trustees, for the purpose of transacting business for said Institute. On the annual settlement the Board of Trustees find in treasurer's hands, \$2,593.27; amount paid out by said treasurer, \$2.571 01; balance remaining in treasurer's hands, \$22.26; amount paid treasurer on commission, \$129.66. We find in the hands of treasurer, in school bill for collection, remaining \$144.73. We find in the hands of the treasurer in notes for collection, \$134.45. Amount remaining uncollected on schoolhouse stock, \$36.50; due, \$338.07. On motion the meeting adjourned sine die.—W. L. Butts, president; Dan. C. Thomas, secretary.

The plaintiffs then read the following entry: "The stockholders of said institute met on the 1st Saturday in December, 1860, organized by calling W. L. Butts to the chair, and Samuel Hunter being chosen as secretary protem. On motion, the stockholders elected as trustees the following named persons, to-wit: W. T. McAllen, W. K. Debord, W. L. Butts, Miles Haile, John C. McAllen, for the ensuing year. On motion, the meeting adjourned.—W. L. Butts, president.—The above named board elected W. L. Butts president for the ensuing year. W. L. Butts, president.

The plaintiffs then read an entry in said book as follows: "North Prairie Farmers' Institute. Board of Trustees met on the 14th of December, 1860, for the purpose of transacting business. North Prairie Farmers' Institute, Dr., to C.P. Woodcock, Treasurer. (Here follows an account, showing the treasurer in advance of \$18.91.) Board of Trustees appointed C.P. Woodcock treasurer for the ensuing year; also D.C. Thomas, secretary. On motion, the board adjourned. Signed, Butts & Thomas."

The plaintiffs then read the following entry: "Annual meeting of directors, on 4th of April, 1863. The stockholders of the North Prairie Farmers' Institute met and elected their directors for said institute, for the ensuing year 1863.

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Motion made by W. L. Butts, that W. Debord act as chairman for the present meeting. On motion, there was some amendment to the 28th section of the by-laws in reference to transfers of stockholders, to-wit: Provided said transfers shall be filed and recorded within sixty days from the time of transfer. By order of the board, the secretary is required to issue certificates to all persons who own stock in the North Prairie Farmers' Institute. On motion, the school money No. 5, in T. 61, R. 36, be applied to payment of former teachers' wages or otherwise in said district. On motion, the meeting appointed John McAllen, Wade, Duncan, Haile and Thomas trustees. On motion, the trustees are required to levy a tax, etc."

To all this evidence objections were made and overruled and exceptions taken.

The same witness continued to state that the trustees had possession of the school building and lot in controversy in 1857, 1858, 1859 and 1860. The rent of said building was worth \$200 per year. The witness left Andrew county in June, 1863, and returned in 1864.

Singleton was then called as a witness for plaintiffs, who stated that he owned 500 shares in the North Prairie Farmers' Institute, and sold them to defendant some twelve or eighteen months before the trial, for a nominal sum.

Dysart says he was a stockholder; attended some of the early meetings; thinks the rent was worth \$200 per annum.

Wade testifies that he was a stockholder and saw defendant at the meetings of the board. McAllen testifies to the same purport. At the meeting in 1863, there were present Thomas. Haile, McAllen and defendant. Defendant claimed the property in 1863.

The plaintiffs then read in evidence a deed from the sheriff of Andrew county to defendant, for the land in controversy, which was sold on a judgment against W. L. Butts, president, William Debord and Wm. J. McAllen, trustees of the North Prairie Farmers' Institute. The deed recited that on the 17th of April, 1862, a judgment was rendered in the Circuit Court

of Andrew county in favor of J. M. Ewing, to the use of S. Falconer to the use of S. Powers, against W. L. Butts, president Wm. Debord and Wm. J. McAllen, trustees of the North Prairie Farmers' Institute, for \$250; that execution issued September 7th, 1863, and that by virtue of this execution, on the 12th of September. 1863, a levy was made, and the sheriff seized all the right, title and interest of said Butts, Debord and McAllen, trustees, etc., in and to said property (describing it) and having twenty days notice, etc., on the 8th of October, 1863, he sold to Woodcock, as the highest bidder, for \$187.71.

The plaintiffs then closed, and the defendant asked the following instruction:

"The plaintiffs are not entitled to recover."

This instruction was refused, and the defendant then introduced as a witness, James Duncan, who said he was not at home in Andrew county, in 1863; did not attend any meeting of the stockholders of the North Prairie Farmers' Institute; had no notice of his election in 1863.

Some other witnesses were examined in relation to the abandonment of the school house during the war. Defendant also stated that he bought the land and house in 1863, and that he allowed a district school to be kept in the house, and only charged a rent for it when taxes were levied on it.

The plaintiffs introduced the judgment under which defendant bought.

The plaintiffs then asked the following instructions:

1. The deed read in evidence from Singleton and wife to Butts. Dysart, etc., trustees, etc., vested the title prima facie.

2. Defendant, if a stockholder and acting at elections, was estopped from denying the character in which plaintiffs sued.

3. Defendant could not deny Singleton's title, if the only title he claimed is by a judgment and execution against Singleton's grantees.

The defendant asked the court to declare that no evidence was produced of Singleton's title and that his deed conferred

no title; and that, unless within ten years previous to the commencement of the suit, plaintiffs had been in possession, no recovery could be had.

There was a verdict and judgment for plaintiffs.

The property in dispute in this case consists of three acres of land and a school house, which, it appears very clearly, was bought from one Singleton, and conveyed to the trustees of the association, termed the North Prairie Farmers' Institute, in 1857. There is no question of Singleton's title, or of the trustees who bought from Singleton.

The only adverse title is the one claimed by the defendant who bought under a sheriff's sale in 1863, under a judgment and execution against the trustees of the association. When the purchase was made he was the treasurer of the association or corporation. He was a stockholder in the company. His purchase must be regarded as made for the benefit of the company of which he was a member, and the title he acquired cannot be considered as hostile to the company, of which he was a member.

There seems to be some question as to whether the present plaintiffs are successors of the original trustees; but the evidence which we have copied in full, is conclusive on this point.

We see no objection to allowing Mr. Duncan to be retained among the plaintiffs when his co plaintiffs gave a bond to indemnify him against costs. He was one of the trustees, and properly named as plaintiff, though, undoubtedly, he might have been placed on the other side of the case, upon allegations that he refused to join. The question is one of practice. He was examined as a witness, and nothing was lost by defendant by his appearing as plaintiff.

This suit was brought in January, 1873. There was no ground for claiming the statute of limitations as a bar to the action, since the defendant's title originated in the last month of 1863.

Judgment affirmed. The other judges concur, except Judge Vories, who did not sit.

Black v. Long.

James W. Black and Joseph E. Black, Appellants, vs. Wil-LIAM LONG and LEONARD BALLOU, Respondents.

1. Conveyance, recording of, after judgment, or filing of transcript from a justice and before sale-Effect of as to purchaser at sheriff's sale-(Davis vs. Ownby, 14 Mo., 170) .- The purchaser at a sheriff's sale will not take the title as against a deed made prior to the judgment and recorded before the sale-or, where the suit is before a justice, after the filing of the transcript with the circuit clerk-and before sale-although the deed is recorded after the rendition of judgment or filing of transcript. The object of the record is to impart notice to subsequent incumbrancers and purchasers-e. g. vendees at sheriff's sale. (Davis vs. Ownby. 14 Mo., 170.) The plaintiff in the judgment acquires a lien which will bind the estate against any subsequent act of defendant. And the rule is not changed by reason of the fact that the deed is executed after the rendition of the judgment or the filing of the transcript, where the person to whom the conveyance is afterward made is at the time of the judgment or filing in possession of the property with a bond for title and has made lasting and valuable improvements, so that he would be entitled to a decree for specific performance as against his obligor.

Appeal from Ray Common Pleas.

William A. Donaldson, with J. W. and J. E. Black, for Appellants.

I. Respondent purchased after and subject to the lien of the judgment against Shaw. (Paul vs. Fulton, 25 Mo., 156; Jones vs. Luck, 7 Mo., 551.)

II. The cases of Reed vs. Ownby, etc., have no application because respondent purchased and paid the purchase money after the judgment lien had attached, and his deed shows this to be the fact. (Valentine v. Havener, 20 Mo., 133; Davis vs. Ownby, 14 Mo., 170.)

III. Respondent's possession was not under our registry law notice, either actual or constructive of his claim or title, and appellants were, in fact and law, innocent purchasers without notice.

C. T. Garner, for respondents.

The purchase by appellants at an execution sale cannot prevail over a recorded deed based upon a title bond and valid Black v. Long.

purchase made long prior to the judgment before the justice, and the filing of the transcript, and followed by actual possession and valuable and lasting improvements (Davis vs. Ownby, 14 Mo., 170; Valentine vs. Havener, 20 Mo., 133); and the possession itself was notice.

WAGNER, Judge, delivered the opinion of the court.

This was an appeal in an action of ejectment where the judgment was rendered for the defendant.

It appears from the record that in the Spring of 1869, one Shaw sold the lots in controversy to Dale and gave him a title bond for a deed. Dale took possession, paid the purchase money and made improvements on the property. He then sold the same to Ballou, the defendant, for a valuable consideration, who went into possession and also made improvements. Dale assigned his title bond to Ballou and by an arrangement between all the parties, Shaw, the vendor, made the deed directly to Ballou. The deed is dated the 3rd day of September, 1870, acknowledged on the same day and filed for record on the 4th day of October, 1870.

On the 6th day of August, 1870, one Martin recovered a judgment before a justice of the peace against Shaw, and on the 18th day of the same month he filed a transcript in the office of the clerk of the Circuit Court, from which an execution issued on the 25th of May, 1871; and on the 6th of September next, thereafter, the lots were sold as the property of Shaw and purchased by the plaintiffs.

The single question is, whether, under the facts as developed in this case, the purchaser at the sheriff's sale, under judgment and execution, will take the title against the prior deed executed, delivered and recorded before the day of the sale; although not acknowledged or of record when the judgment was rendered, or what, as in this case, is the same thing, the transcript was filed.

This question must be considered as conclusively decided and put at rest by repeated decisions in this court. (Davis vs. Ownby, 14 Mo., 170; Valentine vs. Havener, 20 Mo.,

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133; Stilwell vs. McDonald, 39 Mo., 282; Reed vs. Ownby, 44 Mo., 204; Maupin vs. Emmons, 47 Mo., 306; Sappington vs. Oeschli, 49 Mo., 247.)

The reasoning upon which the cases proceed is that the object of recording was to impart notice to subsequent purchasers and mortgagees and not to creditors, merely, as such; that a creditor acquired a lien by his judgment which would bind the estate against any subsequent act of the defendant, but that the purchaser of the estate at the sale, under the judgment was the first person to be affected by the notice as a purchaser. If when he buys at the sale, there is a prior deed on record, the notice is as to him complete.

And it can make no difference in the present case that the deed itself was not made when the transcript was filed. The real title existed in the defendant. He was in possession with a bond for a title; the purchase money had all been paid; and both he and his assignor had made valuable and permanent improvements on the property. Under the facts he would have been entitled to specific performance. Shaw could not have dispossessed him in ejectment. His equities would have constituted a perfect defense, and would have effectually defeated an action. The plaintiffs can surely stand in no better attitude than Shaw, if no deed had been made and no transcript filed; and, if he would have been barred, so are they. They purchased with full notice and they were apprised that Shaw had no title to the property.

Judgment affirmed; all the judges concur.

REASON WILSON, Respondent, vs. THE KANSAS CITY, St. Jo-SEPH & COUNCIL BLUFFS RAILROAD COMPANY, Appellant.

- 1. Texas, cattle—Transportation from one county to another, when prohibited—Construction of statute—Measure of damages.—Under a proper construction of the statute relating to Texas cattle (Wagn. Stat., 251, § 1), if the cattle have not been kept in this State during the entire previous winter, the law forbids their transportation from one county to another. The prohibition is not confined to those who ship or otherwise import the cattle into the State from without (see § 9 as amended by act of March 21st, 1873, Sess. Acts, 1873, p. 72). Nor is the liability of the person, so transporting them, limited to the damages resulting from disease communicated by them while under his control or caused by his want of proper care. The statute makes him liable for all damages, direct or remote, caused by his wrongful introduction of the stock into a county and without regard to the question of negligence or caution. (The opinion of the court did not contemplate a case of damage growing out of the subsequent introduction of the stock into another county, and by another and independent owner.)
- Practice, civil—Instructions—When refusal of proper.—It is not error to refuse an instruction, when those given fairly present the law of the case and are not calculated to mislead.
- 3. U. S. Constitution—Texas Cattle Act no attempt to regulate inter-state commerce.—The statute relating to Texas cattle (Wagn. Stat., p. 251 \(\frac{2}{4}\) 1), is not in violation of the provision of the U. S. Constitution (Art. I, \(\frac{2}{4}\) 8), giving Congress power to regulate commerce among the several States, etc., by reason of the fact that it prohibits the introduction of all Texas cattle during certain seasons of the year. That measure was a necessary police regulation, to prevent the introduction of a contagious and dangerous disease, and in no proper sense an attempt to regulate inter-state commerce, although it might incidentally in some slight degree have an effect upon it.

Appeal from Nodaway Circuit Court.

Willard P. Hall, for Appellant.

I. The Texas cattle act does not prohibit the transportation of that stock from one county within this State to another.

II. The owner of the cattle who turned them out upon the prairie, and not the railroad, caused the damage, and he alone is liable. (Wagn. Stat., §§ 134-136 et seq; also, § 139.)

III. The Texas cattle statute is highly penal and must be strictly construed. (56 Mo., 407.)

1V. It is violative of the power given Congress by the Constitution of the United States to regulate commerce between

the States. (Gibbons vs. Ogden, 9 Wheat., 186; Graves vs. Slaughter, 15 Pet. 511; 7 How. 393.) The State police power to exclude disease, gives the legislature no power to prohibit the introduction of cattle which are not diseased or infected—which it does prohibit by this law; for it makes no discrimination, but excludes them all.

Johnson & Jackson with C. A. Anthony, for Respondent.

I. The defendant violated the law in taking the cattle from one county to another, and was responsible for all damages following. (Sedgw. Dam., 5 Ed., s. p. 88, s. pp. 79-80; Murphy v. Wilson, 44 Mo., 313, and cases referred to; Baxter v. Roberts, 13 Am. Law Reg., 16.41; 1 Am. Lead. Cas., 549; 19 Johns., 381; 4 Denio, 464.) The Missouri statute is similar to the Vermont law. (Sedg. Dam., p. 88, n. 2; Saxton v. Bacon, 31 Vt., 541.) It is also like the Massachusetts statute (Perley v. Eastern R. R. Co., 98 Mass., 414).

The law is a necessary police regulation; (11 Pet., 102, 139; 17 Mo., 13-15; Cool. Const. Law, 573, 2 Ed.) and under the U. S. Constitution is left to the several States. (Cool. Const. Law, 574; 8 How., 632, 592; 36 Ind., 389; 10 Am. Rep., 42-51; 44 Mo., 523; 16 Pet., 539; 58 Ill., 254; 44 Ill., 523; 26 Mo., 441; Pierce Am. R. R. Law, 40, 6 Ed. of 1867.)

Vories, Judge, delivered the opinion of the court.

This action was brought under the provisions of the statutes of this State, concerning Texas, Mexican and Indian cattle.

The petition, after charging that the defendant was a corporation, etc.. proceeded to state, in substance, that the defendant did, on the — day of May, 1873, transport, convey and bring into said county of Nodaway, against the form of the statutes in such case made and provided, (referring to the particular statutes) a great number of Texas, Mexican and Indian cattle, to-wit: one hundred head; that said cattle had not been kept the entire previous winter in this State; that said Texas, Mexican and Indian cattle brought among and communicated to a large number of native cattle a certain disease,

very fatal to said native cattle, known as the Texas or Spanish fever; that said disease was communicated by said Texas, Mexican and Indian cattle, to forty-three head of native cattle, the property of the plaintiff; that a large portion of said cattle of plaintiff died from said disease so communicated, and the remainder were lessened in value; in consequence of all which, plaintiff was damaged in the sum of one thousand dollars, for which judgment is prayed.

The defendant answered denying each allegation of the pe-

tition.

The issues were tried by a jury.

The defendant objected to the introduction of any evidence in the case, for the reason that the petition did not state facts sufficient to constitute a cause of action against the defendant. The objection was overruled and the defendant excepted.

One Addison Case, a witness on the part of the plaintiff, testified that in May, 1873, he resided at Maryville, Nodaway county. His business was the shipping of cattle; that about the 20th of May, 1873, he contracted with the Missouri, Kansas and Texas Railroad Company at the town of Chetopa, in the State of Kansas, about two miles from the southern boundary of the State of Kansas, to ship five car loads of cattle; that he shipped 149 head of cattle over said road to Kansas City, in the State of Missouri, at that time; that he afterwards sold the same cattle to Scott and Snively who lived in Nodaway county, Missouri; that the cattle were shipped over the Missouri, Kansas and Texas Railroad to Fort Scott, and from there, on the Missouri River, Fort Scott and Gulf Railroad, to Kansas City, and there delivered to witness by the last named railroad company; that they were then shipped from Kansas City, Missouri, to Maryville, in Nodaway county, Missouri, by the Kansas City, St. Joseph and Council Bluffs Railroad Company, over their road to Maryville, in Nodaway county, and there delivered to said witness; that the cattle came the whole distance from Chetopa to Kansas City in the same cars; that the same cattle were then shipped to Nodaway county, as aforesaid, by defendant,

and were unloaded at Maryville, in said county, and there delivered to witness about the 24th day of May, 1873; that the defendant had no further control of said cattle after they were unloaded and delivered to witness as aforesaid; that the agents of the defendant when the cattle were received and placed on defendant's cars at Kansas City knew upon what train and road the cattle had been brought to Kansas City, and that there were back charges due on the cattle for freight; that witness continued to own said cattle for two weeks after they were delivered to him at Maryville, and that they were herded on the 102 river bottom just east of Maryville and near the depot, where they were delivered, for a considerable time.

The plaintiff introduced other witnesses whose testimony tended to prove that defendant had delivered the cattle, before spoken of, to Case on or about the 24th day of May, 1873, from its train of cars; that the cattle were Texas cattle; that said cattle were herded just east of and near to the depot, where they had been unloaded, for some weeks after their arrival at the depot; that they herded on the bottom lands west of the river 102; that plaintiff at the time that these Texas cattle were delivered at the depot at Maryville, was the owner of a herd or drove of cattle of what are called the native breed; that his cattle had been, and were then running and grazing on the bottom prairie land along the west side of the river 102, at the same place where the cattle of Case were herded; that some two months after the cattle belonging to Case had been brought to Maryville, and herded as before stated, a large number of plaintiff's cattle became sick with a peculiar disease, and many of them died, and others were injured and damaged; that other cattle that were in the vicinity of where the Case cattle were herded in the county were also afflicted apparently with the same disease with which plaintiff's cattle died, and many of them also died. The evidence of witnesses who had seen cattle, at various times, suffering from what is called Texas or Mexican fever, tended to prove that plaintiff's cattle had died of said fever and that the disease had been communicated to said cattle as well as others

in the same vicinity, by the cattle of Case, shipped there by defendant.

The evidence also tended to prove that plaintiff was damaged by the disease thus communicated to his cattle in a sum sufficient to justify the damages found and recovered.

The defendant offered no evidence. At the close of the evidence the court, at the request of the plaintiffs, instructed

the jury as follows.

1. "If the jury believe from the evidence that the defendant by its agents, servants or employees, conveyed into the county of Nodaway, in the State of Missouri, between the 1st day of March, 1873, and the first day of November in said year, and about the time mentioned in plaintiff's petition, any Texas, Mexican or Indian cattle, and caused the same to remain in said county of Nodaway by unloading the same from its cars, and they further believe that said Texas, Mexican or Indian cattle communicated a disease, known as Texas or Spanish fever, to the cattle of plaintiff, or any of them, by which they died, or were injured, then they will find for the plaintiff, unless they further find from the evidence that such Texas, Mexican or Indian cattle had been kept within the State of Missouri the entire previous winter of 1872 and 1873."

2. "Whether the defendant conveyed any Texas, Mexican or Indian cattle into Nodaway county and unshipped them, and whether such cattle communicated the disease called 'Texas fever' to plaintiff's cattle, and whether they died of such disease, and whether said cattle were conveyed or brought into the State, or into said county between the first day of March and 1st day of November, 1873, are all questions for the jury to determine from the whole evidence, and it devolves upon the plaintiff to prove to the satisfaction of the jury, by a preponderance of the evidence, that the defendant conveyed such cattle into this State and unshipped them here, and that the plaintiff's cattle died of the disease known as Spanish or Texas fever, communicated to the cattle, by the cattle so shipped by defendant. And if you find that plaintiff's cattle died of such disease communicated to them by such Texas cattle,

the fact is prima facie evidence that such cattle were in the State in violation of the law, and it would devolve upon the defendants to show that said cattle have not been conveyed into this State between the 1st day of March, and the first day of November, 1873, or have been wintered the whole of the previous winter in this State."

3. "If the jury find for the plaintiff they will estimate his damages at the reasonable value of the cattle that died of said disease, less any profit realized from those that died, together with such sum as you may believe from the evidence plaintiff has sustained by injury to other cattle affected by said disease which did not die, and the reasonable expenses and value of his time in caring for and endeavoring to cure said cattle."

The defendant at the time objected to the foregoing instructions. Its objections being overruled it excepted.

The court gave the jury two instructions prayed for by the defendant, the first of which is substantially identical with the 3rd instruction given for the plaintiff. The second reads as follows:

"The jury cannot presume that from the mere fact of plaintiff's cattle sickening and dying, they did so from the effects of what is known as Texas fever; but you must believe from the evidence that the disease of which they sickened and died was in fact Spanish or Texas fever, so called, and that said disease was brought about and communicated, or caused to be communicated to plaintiff's cattle by said Texas, Mexican or Indian cattle so shipped or brought into the county by the defendant, between 1st day of March and the first day of November, 1873."

The defendant also asked the court to give the jury several other instructions which were refused by the court and exceptions saved.

The first of these refused instructions is as follows: "It devolves upon the plaintiff to prove that the Texas, Mexican or Indian cattle, mentioned in his petition, were conveyed into this State, as well as into Nodaway county, by defendant

and that they had not been wintered the entire previous winter in this State, and unless the jury so believe, they will find for the defendant."

The other instructions asked by the defendant and which were refused by the court told the jury in effect that if the disease with which plaintiff's cattle died, was not communicated to them by said Texas cattle while they were being transported into Nodaway county by defendant, or while they were in the cars or cattle pens of defendant and under its control, then, defendant would not be liable to plaintiff for any damages sustained by him in consequence of said disease having been communicated to plaintiff's cattle, and that in such case they should find for the defendant.

The jury found for the plaintiff and assessed his damages at \$---.

The defendant in due time filed its motions in arrest of judgment and for a new trial, which were severally overruled by the court, and final judgment rendered, when the defendant saved its several exceptions and appealed to this court.

I apprehend that the material questions involved in this case depended upon the proper construction to be given to the statute relating to the bringing into this State of Texas, Mexican or Indian cattle at certain prohibited periods of the year. (1 Wagn. Stat., p. 251.)

The first section of the act referred to is as follows, to-wit: "No Texas, Mexican or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this State between the 1st day of March and the first day of November in each year, by any person whatsoever; Provided, That nothing in this section shall apply to any cattle which have been kept the entire previous winter in this State; Provided further, That when such cattle shall come across the line of this State, loaded upon a railroad car or steamboat, and shall pass through this State without being unloaded, such shall not be construed as prohibited by this act; but the railroad company or owners of a steamboat performing such transportation shall be responsible for all damages which may result from the dis-

ease called the Spanish or Texas fever, should the same occur along the line of such transportation; and the existence of such disease along such road shall be *prima facie* evidence that such disease has been communicated by such transportation."

The second and third sections of said statute provide for the arrest and punishment of persons who have driven or otherwise conveyed into a county any of the prohibited cattle in violation of the first section, etc.

The ninth section of the statute provides a remedy in favor of persons injured by a violation of the statute. It is as follows: "If any person or persons shall bring into this State any Texas, Mexican, or Indian cattle, in violation of the first section of this act, he or they shall be liable, in all cases for all damages sustained on account of disease communicated by said cattle."

By an act of the legislature of this State, approved March 21st, 1873, and which took effect from its passage, the ninth section above set forth was amended, which amendatory act reads as follows: "Section 1st. Section nine of an act entitled 'An act to prevent the introduction into this State of Texas, Mexican or Indian cattle during certain seasons of the year, approved February 26th, 1869,' is hereby amended so as to read as follows: Sec. 9. If any person or persons shall bring. into this State, or shall drive or otherwise convey into or cause to remain in any county in this State, any Texas, Mexican or Indian cattle, in violation of the first section of this act, he or they shall be liable in all cases, for all damages sustained on account of disease communicated by said cattle; and the fact that disease has been communicated by any Texas, Mexican or Indian cattle, shall be prima facie evidence that said cattle are in this State in violation of the first section of this act."

It is insisted by the defendant that the court erred in giving the jury the instructions given at the request of the plaintiff, that the act under which the action is brought only

prohibits the importation into this State from another State. but does not prohibit the transportation of Texas or Indian cattle from one county of the State to another, or from one part of the State to another. I do not think that the construction given by the defendant is the proper construction to be given to the act referred to. The first section of the act provides that none of the prohibited cattle shall be driven or otherwise conveyed into any county in this State between the first day of March and the first day of November of each year, unless such cattle shall have been kept the entire previous winter in this State. It makes no difference where the cattle start from, whether in this State or another State, under this clause of the section. If the cattle have not been kept in this State for the entire previous winter, the driving or conveying of them into another county in this State is prohibited. Suppose that a person should ship Texas cattle into some of the southern counties of this State in the month of February. The shipping into the State would not be unlawful and such cattle might be permitted to remain in the State without the violation of any law, up to the last day of February, but if they were permitted to remain in this State until after the first day of March such remaining after the first of March would be a clear violation of the law. We will suppose that the owner of the cattle in place of removing such cattle out of the State before the first of March, leaves the southern part of the State on the last day of February and conveys said cattle to Nodaway county where he arrived with the cattle some time in March. Would it be pretended that he could not be prosecuted under this act for conveying the cattle into Nodaway county after the first day of March ? If the construction given to the statute by the defendant is correct, the people of Nodaway county would have no remedy under the statute no matter how much disease was communicated to their cattle by the Texas cattle thus driven or conveved into the county, for at the time the cattle came into the State it was not unlawful to bring them, and in fact, the cattle had not been brought into the State between the 1st of March and November.

It is further provided by the same section that cattle may come across the line of the State in cars or steamboats and pass across the State without being unloaded; but even in that case the owners of the cars or steamboat are made liable for all damages occasioned by the communication of disease by said cattle to the cattle of other persons along the line of travel.

By the language used in the second section of the act, it further appears that the prohibition of the law was not intended to be confined to those who shipped or otherwise conveyed cattle from without the State into the State. Said section provides that: "Whenever complaint shall be made in writing upon the oath of any one competent to testify, and filed with any justice of the peace in this State, that any person or persons have driven or otherwise conveyed into the county where such justice resides, any Texan, Mexican, or Indian cattle, or has under his or their control any such cattle, contrary to the first section of this act, it shall be the duty of such justice of the peace to issue his warrant for the arrest of such person," etc. It will be seen that the complaint authorized under this section is not required to state that the cattle have been brought to this State by the party prosecuted; but that the accused had conveyed them into the county where the justice resides.

It is true that the ninth section of the act, as it stood before it was amended by the act of 1873, only furnished a remedy in damages in favor of the parties injured against persons violating the first section of the act, in cases where the cattle had been brought into the State during the prohibited periods. It is evident that the omission in the ninth section to furnish a remedy in favor of parties injured, against persons who had unlawfully driven or otherwise conveyed the prohibited cattle into any county of the State, regardless of the point from which the cattle were started, was that which led to the amendment of said section by the act of 1873. The amendatory act clearly recognizes the two distinct offences and provides for each. It provides that "If any person or persons shall bring into this State, or shall drive or otherwise convey into or cause to remain in any county in this

State," etc. This clearly recognizes two different acts, each amounting to an offence, the first to transport cattle of the prohibited class into this State; and the second, to drive or otherwise convey said cattle into any county in this State. When the statute is all considered together it seems clear that an offence may be committed by conveying cattle from one part of this State into a different county in the State.

In construing this act we cannot shut our eyes to the history of this State and the surrounding facts and circumstances at the time, which led to the enactment of the statute of 1869. There had been considerable commotion created in some parts of the State growing out of the driving or shipment by cattle dealers, who were dealing in Texas or Mexican cattle, in large numbers into certain portions of this State. The Texas fever had been communicated to large numbers of the cattle and was destroying almost entire herds of cattle belonging to the citizens where the Texas cattle were permitted to roam.

In some places the citizens were threatening the destruction of the Texas cattle thus brought into their neighborhood, and they were generally demanding some kind of relief. It frequently happened that after the cattle in one community had been infected with disease, and the people there had become inimical to those who had control of the Texas cattle, the owners, or those having control of said cattle, would move their cattle into a different part of the State, and into some prairie county where there was an abundance of grass, and there infect the native cattle with the disease. To prevent this changing from county to county and infecting the cattle with disease throughout the whole country, was one of the principal objects of the statute of 1869; and it was to provide a civil remedy to parties injured in such cases that the amendatory act of 1873 was adopted.

It is next insisted by the defendant, that the defendant if liable for the transporting of Texas or Mexican cattle during the prohibited season into Nodaway county, would only be liable for damages resulting from disease communicated to the cattle of others while the prohibited cattle were in its pos-

session or under its control; that after the railroad company had parted with the control of the cattle by delivery thereof to the owner, it could not be held liable for damages resulting from the conduct of others; "that the consequences of such a doctrine would be, that capital would be obliged to bear the burden, not merely of its own want of caution, but of the want of caution of everybody else. If an injury occurred through negligence, the chain of effects will be traced back until a capitalist is reached, and he, being thus made the cause, would be liable for all the subsequent negligence of others on the same subject."

It seems to me that the position of the defendant above taken, and the foregoing quotation made by it from "Wharton's Law of Negligence" to sustain said position, are both foreign to the question involved in this case. This case is wholly governed by the statute under which the action is brought. There is no question of caution or negligence on the part of the defendant involved in the case. Nor is it material whether the damages were the direct or remote consequence of the illegal act of the defendant, provided the facts bring the cause within the provisions of the statute. The greatest amount of caution and care on the part of the defendant while transporting the cattle could do the plaintiff no good. The statute has made it unlawful to convey Texas cattle into any county in this State between certain periods of each year, and the same statute fixes the consequences of its violation. The consequences provided by the statute are that in addition to fine and imprisonment which may be inflicted, "that he or they shall be liable in all cases, for all damages sustained on account of disease communicated by any Texas, Mexican or Indian cattle; and the fact that disease has been communicated by any Texas, Mexican or Indian cattle, shall be prima facie evidence that said cattle are in this State in violation of the first section of this act."

It would be impossible to use language that would make this statute more general and comprehensive. The statute ignores all questions as to caution or negligence on the part of

one who has violated its provisions, and makes the guilty parties liable for all damages sustained in consequence of disease communicated by the cattle wrongfully brought into the county. If the cattle should afterwards be driven or otherwise conveyed from the county into which the defendant had conveyed them, by their owner or others wholly unconnected with defendant, into another and different county in the State, this would be a new and distinct violation of the statute, and the question as to who and who only would be liable for damages suffered by the citizens of the last named county, would admit of altogether different considerations; but that question is not before us in this case.

We are reminded that this statute is highly penal in its consequences, and ought, therefore, to be strictly construed. It is true that penal laws are generally strictly construed; but this statute is remedial as well as penal and should not be so strictly construed as to defeat one of the most obvious objects of its creation. It is also true that this statute may, in some cases operate rather harshly on individuals who may be engaged in conveying cattle from one place to another in this State; but the evil intended to be remedied was at the time threatening the destruction of one of the leading industries of this State. The remedy provided was intended to be effectual. The court properly refused the instruction asked on the part of the defendant and which is complained of. The instructions given to the jury by the court when all taken together fairly presented the law of the case to the jury and were not calculated to mislead.

It is next insisted by the defendant that the statute under which this action was brought is in violation of that provision of the constitution of the United States which provides "that Congress shall have power to regulate commerce with foreign nations and among the several States and Indian Tribes" and that consequently said act is wholly void. It is insisted that the act not only prohibits the introduction of diseased cattle into this State, which it is conceded may be done, but that it prohibits the importation of all cattle in the act

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designated whether they are or are not diseased. It is assumed by the Legislature in the act in question, that all Texas or Mexican cattle are liable, at certain seasons of the year, to communicate disease to, and among the native cattle of the State, when brought to this State during the prohibited season. In fact it was known to be the usual and natural result, that when such cattle were brought into this State at the prohibited season, the Texas or Mexican fever followed them whereever they went. Under such circumstances it was not only inconvenient but impossible to select or pick out the particular animals in a herd which were capable of propagating said disease. On the contrary, it was, and is, believed to be dangerous to the safety of our native cattle to permit any Texas or Mexican cattle to be brought into the State during the prohibited season of the year, whatever their apparent health might be. It therefore became necessary to prohibit the introduction of all Texas or Mexican cattle into this State at certain seasons of the year or to abandon the breeding of native cattle by the citizens of this State. The Legislature under such circumstances, assumed, and had a right to assume, that it would endanger the property of the citizens of the State to permit the prohibited cattle to enter the State at certain seasons of the year.

The right of a State to enact such police regulations as are necessary to protect her citizens from contagious and dangerous diseases, and to protect their property from calamity or destruction cannot be denied. Such regulations by a State are in no sense an attempt to regulate commerce among the States. Such police powers were never delegated to Congress; and, indeed, could not be, without a total surrender on the part of a State of the power to protect or preserve her own citizens. Congress is not to be looked to by the citizens of a State for such police regulations as will protect themselves and their property from disease and consequent destruction. These police regulations reside in the legislative power of the State, and their exercise is not in conflict with the provision of the constitution referred to. And it makes

no difference that such regulations when adopted by the State for such a purpose should incidentally, in some slight degree affect the commerce carried on between citizens of different States. (Lewis vs. Boffinger, 19 Mo., 13; City of St. Louis vs. McCoy, 18 Mo., 238.)

It would be a useless labor for me to attempt to examine and comment upon the different cases referred to by the attornevs for the respective parties in this case. The identical question involved in this case has been, on several occasions, brought before the Supreme Court of the State of Illinois, growing out of the construction of a statute of that State prohibiting the introduction of the same class of cattle into that State. It has been uniformly held by that court that the law of said State substantially like the law under consideration was not in conflict with the constitution of the United States; but that the same was simply a proper exercise of the police power vested in the State for the preservation of her own citizens. The last time that the question was brought before the Supreme Court of Illinois was on the 16th of January, 1875 in the case of the Chicago and Alton Railroad Co. vs. Gassaway. (Chicago Legal News for January, 1875, p. 147.) Scholfield, justice, delivering the opinion in that case remarks: "The constitutionality of the 'act to prevent the importation of Texas or Cherokee cattle into the State of Illinois, approved February 27th, 1867' was affirmed in Yeazel vs. Alexander, 55 Ill., 255; Stevens vs. Brown, Id., 289; Somerville vs. Monks, Id., 371; and it has been recognized in numerous subsequent cases. Since, therefore, there is nothing in the amendment to the act approved April 16th, 1869, under which the action arose to which the reasoning in those cases is not applicable it cannot be profitable to consume further time in the discussion of the question thus settled."

We concur in the views of the Supreme Court of Illinois in believing that the statute is simply a proper police regulation on the part of the State, and is not to be construed as conflicting with the constitution of the United States.

There were some other questions raised and saved in the Circuit Court during the trial of the case; but they have not been insisted on in this court and will not be discussed here.

The judgment will be affirmed; the other judges concur.

Aquilla D. Read, Respondent, vs. The St. Louis, Kansas City and Northern Railroad Company, Appellant.

- 1. Carriers—Bill of lading, stipulation against freezing—How far exempts carrier from liability.—Notwithstanding that by the bill of lading it was stipulated that a cargo of potatoes was to be carried by a railroad at the owner's risk of freezing, yet the road would be liable for all such damage caused by the failure to forward the potatoes with reasonable dispatch.
- Practice, civil—Instructions.—Instructions not based on evidence, are properly refused.
- 3. Common carrier cannot by contract protect himself against his own negligence.

 —The doctrine is now well established in this State that a common carrier can, by special contract, limit his common law liability; but he cannot exempt himself from the consequences of his negligence.
- 4. Common carrier—Risks excepted in bill of lading—Exception must be sole cause of damage, etc.—Where the loss of or injury to a cargo, shipped on a railroad, occurs from any of the causes excepted in a bill of lading, in order that the company may be relieved from liability, it must appear that the exception named is the proximate and sole cause of the damage. If the negligence of the carrier mingles with it as an active and co-operative cause, the carrier will be responsible.
- 5. Common carrier—Action against for loss of goods—Plaintiff in first instance need only prove loss—Exemption under contract, how pleaded and proved—Negligence of carrier, how made out.—In suit against a common carrier for damage to a cargo of goods, plaintiff in the first instance is only required to prove the delivery and loss, and if defendant pleads an exemption under his contract, the burden is upon him to prove that the loss was occasioned by the cause excepted; but he is not required to go further and prove affirmatively that he was guilty of no negligence. Proof of that fact will rest upon the plaintiff. And such proof is made out by showing that the injury might have been avoided by the exercise of reasonable skill and attention on the part of the carrier.
- Railroad strike no excuse for delay in delivering freight.—The sudden and wrongful refusal of its employees to work will not excuse a railroad company for failure to transport freight in the usual time.

Appeal from Buchanan Circuit Court.

W. H. Sherman, for appellant.

I. Where it is shown that a loss by a common carrier was occasioned by a cause from which he is by law or special contract exempted from liability, the burden is cast upon the shipper to establish the negligence of the carrier. In other words, the shipper then holds the affirmative in establishing the liability of the carrier for negligence. (N. J. St. Nav. Co. vs. Merchants' Bk., 6 How., 382; Railroad Co. vs. Reeves, 10 Wall., 176; Clark vs. Barnwell, 12 How., 280; Muddle vs. Stride, 9 Carr. & P., 385; Western Tr. Co. vs. Downer, 11 Wall., 129, S. C. 10 Am., L. Reg. (n. s.) 360; Western Tr. Co. vs. Newhall, 24 Ill., 469; Farnham vs. C. & A. R. R. Co., 55 Pa. St., 58; Colton vs. C. & P. R. R. Co., 67 Pa. St., 213.)

II. What is reasonable time, and what is delay, must always be determined by the circumstances under which the carrier acts. (Parsons vs. Hardy, 14 Wend., 217; Harmony vs. Bingham, 12 N. Y., 99; Wibert vs. N. Y. & E. R. R., 19 Barb., 36; S. C., 12 N. Y., 245; Conger vs. H. R. R. Co., 6 Duer, 375; Swetland vs. B. & A. R. R. Co., 102 Mass., 276.)

Defendant is not liable for delay caused by the acts of third parties who prevent the operation of its railroad, notwithstanding the exercise of reasonable care and prudence to avoid delay. (Conger vs. H. R. R. Co., 6 Duer., 375; see also, Blackstock vs. N. Y. & Erie R. R. Co., 1 Bosw., N. Y., 78; S. C., 20 N. Y., 48.)

In the above cases the decisions hold the carrier responsible for injuries resulting from a strike of engineers; but they were based upon the fact that it was the sudden and faulty refusal of the large body of defendant's engineers, then their servants, to do their duty that caused the delay in question.

But in this case, as shown by the evidence, the rebellious engineers left the defendant's service when the strike began, and defendant made every effort in its power to suppress their riotous demonstrations and to employ other servants.

To render defendant liable for damages by the freezing, its negligence must have been an active and co-operative cause.

If the delay was excusable, as shown to be by the facts, and if the cars were suitable, defendant did its duty as a common carrier. (Levering vs. Un. Tel. & Ins. Co., 42 Mo., 95.)

III. The freezing in this case was not a natural result of the delay. It was the remote and not the immediate consequence. And hence defendant cannot be held liable. (See Denny vs. N. Y. Cent. R. R. Co., 13 Gray, 481; Hazard vs. N. E. Mar. Ins. Co., 1 Sumn., 229; Delano v. Bedf. Ins. Co., 10 Mass., 354; Morrison vs. Davis, 20 Penn. St., 171; Hoadley vs. N. Trans. Co., 115 Mass., 304; Ballentine vs. N. Mo. R. R. Co., 40 Mo., 505; Clark vs. Pac. R. R., 39 Mo., 190.)

Doniphan & Reed for, respondent.

The delay was caused by the fact that defendant's employees suddenly and wrongfully refused to work, and defendant cannot avail itself of this fact, even though it used effort and diligence to obtain other employees. (1 Bosw., 77; 20 N. Y., 48.)

II. The freezing is claimed by appellant to be an act of God; but the law is, that even in that case, if the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible.

In the case at bar, the loss was owing not merely to the act of God, but to the strike which caused the delay; and the neglect and inattention of the servants to duty were those of the master, and so the negligence of the company contributed to produce the loss.

III. Whatever stipulations may be contained in a bill of lading, the carrier cannot by contract exonerate himself from the consequences of his own negligence.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff alleged in his petition that on the 22d day of March, 1873, he delivered to defendant at St. Joseph, Mo., one thousand bushels of potatoes, to be conveyed to his consignees at St. Louis, with reasonable speed and dispatch; that defendant, for a compensation paid by plaintiff, undertook

to deliver the same on the next day in good condition. There was an averment that, disregarding its duty and agreement, defendant negligently failed to carry, and deliver the potatoes at St. Louis, with speed and diligence, but negligently stopped and delayed the potatoes by the way for a period of ten days, so that they were frozen, rotted, and rendered wholly worthless; and that the damage to the potatoes was entirely in consequence of defendants' negligently failing to deliver them.

The answer denied these allegations, and for a further defense it was stated that when the potatoes were delivered to defendant, there was a stipulation entered into between the parties by which it was agreed that the potatoes were to be carried at the owners' risk of freezing. It is further alleged that the potatoes shipped on the 22d of March arrived at their destination on the 31st day of the same month, and that from the time they were shipped, and continuously thereafter, until about the first day of April, the defendant was prevented from running or carrying freight or freight cars over the line of its railroad by unavoidable and unforseen misfortune; that defendant endeavored by diligence and care to deliver the freight at its destination, but that during the time mentioned several persons and lawless bands of men assaulted defendants' employees, and that by such assaults and threats of personal violence, drove the employees away, so that defendant could not run or operate its road, and that lawless bands of men tore up the track and burned bridges, rendering it impossible to transport freight on the cars without many de-

A replication was filed to this answer which alleged among other things, that the lawless persons and bands of men were dissatisfied and disaffected employees of defendant engaged in a "strike," and that all difficulties arising from this cause were over before the potatoes were shipped.

The trial was before the court with a jury, and there was a verdict and judgment for the plaintiff.

The evidence shows that at the time the potatoes were delivered to the defendant, it gave a receipt for them in the nature of a bill of lading, which had written upon its face the words "owner's risk, freezing." The evidence further showed that the difficulty in running the trains was occasioned by what was called a "strike" among the defendant's engineers, originating in consequence of the employment of an engineer that did not belong to their brotherhood, and that their places were supplied as rapidly as defendant could get others to take them.

For the plaintiff, the court instructed the jury:

1. That if they believed from the evidence that the potatoes were shipped to be delivered in St. Louis, within a reasonable time, and that they were damaged by reason of the carelessness, delay and negligence of the defendant in delivering them to the consignees, then the jury should find for the plaintiff.

2. That if the agent at St. Joseph induced the plaintiff to ship the potatoes by representing that the road was clear, and that they would be delivered in St. Louis within twenty-four hours, or thereabouts, and relying upon such representations, plaintiff paid the freight, and a failure to deliver within a reasonable time, resulted in a loss to plaintiff by freezing, then he was entitled to recover for such loss; and

3. That it devolved on the defendant to show, notwithstanding the exception exempting it from loss by freezing, that the loss did not occur through any fault, want of care, or negligence on its part, or the part of its agents or employees.

The defendant asked the court to give ten instructions. The court gave the third, eighth, and tenth, and the first and fourth in a modified form, and refused the others.

The first instruction declared, that it was admitted that on or about the 22d of March, 1873, the plaintiff shipped a quantity of potatoes to be carried by defendant to St. Louis, at the owner's risk of freezing; and if the jury believed from the evidence that defendant's freight trains and cars in which the potatoes were shipped were delayed on the railroad by

obstructions thereon placed by persons other than servants or employees of the defendant, or by other riotous conduct of such persons along the line of the railway, and that defendant, with great care and diligence and regard for the property of plaintiff and others, strove to carry (among others) the cars containing plaintiff's potatoes, to St. Louis, and to avoid delay; and that notwithstanding defendant's care and diligence, plaintiff's potatoes were delayed by such obstructions and riotous conduct, and that during such delay they were injured by freezing, then plaintiff cannot recover for such injury.

The third instruction states the proposition that it is admitted in the case, that when the plaintiff's potatoes were shipped by defendant for St. Louis, plaintiff assumed all risk of loss in consequence of freezing; and if the jury believe from the evidence that the potatoes were frozen while being carried by defendant to St. Louis, and that the damage to them by freezing was not produced or aided directly by the negligence or want of reasonable care on the part of defendant's servants or agents, then they will find for defendant.

The fourth instruction told the jury that under the contract read in evidence defendant was only obliged to transport the potatoes with reasonable speed and dispatch; and if they believed that, while the potatoes were being carried to St. Louis by the defendant with such reasonable speed and dispatch, they were injured by freezing, then plaintiff could not recover for such injury.

The eighth instruction declared that, if it was found from the evidence that injury to plaintiff's potatoes by freezing must have happened even though the defendant earried them to St. Louis in a reasonable time, the verdict should be for the defendant.

The tenth instruction merely related to the measure of damages.

The second instruction asserted that the defendant was not liable for damages for freezing the potatoes, even though it might be found that they would not have been injured had they been carried and delivered with the usual or ordinary speed. This instruction was properly refused. Notwithstanding the exemption of the risk against freezing, it was the duty of the carrier to forward the potatoes with reasonable dispatch, and for all losses occasioned by its negligence or carelessness in omitting to perform the work imposed upon it by its employment, it will be held responsible.

The seventh and ninth instructions, refused, had reference to the delay caused by the interruption of the trains by those who were obstructing the travel on the road, the former declaring that the company was not liable if the delay was caused by the acts of third parties, or was produced by causes which defendant could not control, and the latter announcing the proposition that there was no liability, if the obstructions, assaults and hindrances, were produced by persons not at the time in the service of the company, although they or some of them might have been in its employment at the commencement of the difficulties. These instructions were rightly refused.

The court had already sufficiently instructed the jury upon this subject, and the propositions contained were not justified by the evidence.

The fifth declaration refused for the defendant, is the converse of the one given for the plaintiff on the same question, and is as follows:

"The plaintiff having assumed in his contract with defendant the risk of loss resulting from the freezing of his potatoes, shipped on defendant's railroad, the defendant is not liable for any such loss, unless the jury believe from the evidence that such loss was occasioned through negligence or want of due care on the part of defendant, or its agents or servants, and the burden of proving such negligence or want of due care lies on the plaintiff."

The doctrine is now well established in this State, that a common carrier by a special contract can limit his common law liability, but he cannot exempt himself from the consequences of his negligence. (Levering vs. W. T. & I. Co., 42

Mo., 88; Wolf vs. The Am. Ex. Co., 43 Mo., 421; Ketchum vs. The Am. Mer. U. E. Co., 52 Mo., 390.)

In the first place, all that it is necessary for the plaintiff to do to make out his case is, to show the delivery of the goods to the carrier, and the burden of accounting for them is cast upon him. If the carrier would exonerate himself from responsibility, he must either deliver the goods or prove that the loss occurred by the act of God, the public enemy, or by reason of some special exemption contained in a contract. Where the loss occurs from any of the causes excepted in the undertaking, the exception must be the proximate cause of the loss, and the sole cause. And where the loss is attributable to such cause, still if the negligence of the carrier mingles with it as an active and co-operative cause, he is responsible. When the loss of the goods is established, the burden of proof devolves upon the carrier to show that it was occasioned by some act which is recognized as an exemption. This shown, it is prima facie an exoneration, and he is not required to go further and prove affirmatively that he was guilty of no neg-The proof of such negligence, if negligence is asserted to exist, rests on the other party. It is competent for the owner to show that the injury might have been avoided by the exercise of reasonable skill and attention on the part of the carrier. For then, without regard to his exemption from liability, it will be considered as a loss happening on account of his negligence and inattention and the want of that care and diligence which the law imposes upon him. But the burden devolves upon him to counteract the case made by the carrier, when it is shown that the loss occurred on account of some act excepted in the contract or undertaking. (Wolf vs. The Am. Ex. Co., 43 Mo., 421; Railroad Co. vs. Reeves, 10 Wall., 176; Lamb vs. Cam. & Amboy R. R. Co., 46 N. Y., 271; Cochran vs. Dinsmore, 49 N. Y., 249.

But in the present case, the defendant did not stop with simply alleging that the damage occurred by freezing, which *prima facie* released it from responsibility. It admitted the delay and undertook to justify, on the ground that it was not

a negligent delay. When the admission was made that the potatoes were not delivered in time, and an excuse was set up therefor, then the duty of showing that the excuse was a sufficient one devolved upon the defendant. Having admitted that it was in fault, the burden was upon it of showing that that fault was not negligence.

We think the court declared the law correctly in requiring that, in order to amount to an excuse for the delay, the obstructions to the running of the trains should have been the work of persons other than the employees or servants of the road.

A company will be held responsible for damages resulting from a delay to transport freight in the usual time, when it is caused by its servants suddenly and wrongfully refusing to work. Because the employees refuse to work or perform their usual employment, it will not release the company or the carrier from the responsibility of his contract. It may be his misfortune, but third persons are not to suffer thereby. His liability is all the same whether he could get others to supply their places of not.

If a contractor should enter into an agreement to build a house, and have it completed at a certain stipulated time, and his workmen should leave him, so that he could not finish it at the time, surely this would not release him from liability in not fulfilling his contract.

In the case of Blackstock vs. The N. Y. & E. R. Co., (20 N. Y., 48) the action was brought against the defendant as a common carrier, for a delay in the carriage of a large quantity of potatoes in barrels and sacks from Hornellsville in Steuben county, to the city of New York. They were received by the defendant on different days, and would have been delivered according to the usual course of business, within five days, but they were detained about seventeen days, and, when delivered, were found to have become unmerchantable, and were almost worthless. The delay was occasioned by the refusal of a large number of the defendant's engineers to work. The defendant used diligent efforts to procure other engineers.

to run its trains, but was not successful. The court held that these matters constituted no defense. A similar point was ruled in Weed vs. The Panama Railroad Co., (17 N. Y., 362) where the misconduct of the defendant's servants in detaining a train of cars was active, but it was held not to furnish any answer to the action for the detention.

In the case at bar the excuse arises wholly out of the misconduct of the defendant's servants, the engineers, in refusing to perform their duties and attempting to keep others from taking their places. But this in nowise exonerated the defendant from complying with its contract. The relations existing between the several parties were wholly different. Between the plaintiff and engineers there was no privity. The latter owed no duty to the former which the law can regard or recognize. They committed against him no positive tort or trespass, which would enable him to pass by the master and bring an action directly against them. The defendant was liable for their conduct and might proceed against them for damages for their tortious acts, but the plaintiff could not, as they were not committed against him.

We cannot see that the court committed any error in its instructions on this subject. If the trains were delayed or interrupted by an armed mob, over which defendant had no control, that might afford an excuse, provided reasonable care and diligence were used by the defendant; but for the acts, omissions and wrongs of its servants it was liable over to the plaintiff.

The court did right in modifying defendant's fourth instruction. As originally drawn, it released the defendant from liability if it carried the potatoes with reasonable speed and dispatch, under all the circumstances of the case.

The contract was an absolute undertaking, and there was no exception made in reference to any circumstances by which the defendant was surrounded. Besides there was no evidence to justify it; but there was evidence to show that the agent represented to the plaintiff that the road was clear, and that the potatoes would be delivered in St. Louis within

twenty-four hours, and upon this evidence plaintiff's instruction was predicated. But these questions, under proper instructions, were all fairly submitted to the jury.

We have seen no error in the court in regard to its ruling in the admissibility of evidence, and upon a view of the whole record, the judgment should be affirmed. All the other judges concur.

Daniel H. Cary, Respondent, vs. St. Louis, Kansas City & Northern Railway Co., Appellant.

1. Railroads—Killing of stock caused by failure to fence—Question of negligence.—Where the petition charges that the killing of stock by a railroad company was caused by its failure to fence its road at a point where it was required to fence, and where the accident occurred (Wagn. Stat., 310, § 43) the question of negligence cannot be raised.

 Railroads—Failure to fence track—Killing of stock along uninclosed lands, not shown to be prairie land as well.—The failure of a railroad to fence its track through uninclosed land will not make it amenable for killing stock at that point unless the land was shown to be prairie land.

Appeal from Carroll Circuit Court.

Ray & Ray, for Appellant, cited Lloyd vs. Pac. R. R. Co., 49 Mo., 199.

Hale & Eads, for Respondent, referred in argument to Calvert vs. Hann. & St. Jo. R. R. Co., 30 Mo., 242; Id., 38 Mo., 467; Gorman vs. Pac. R. R., 26 Mo., 441; Trice vs. Hann. & St. Jo. R. R., 49 Mo., 438; Biglow vs. North Mo. R. R., 48 Mo., 510; Meyer vs. North Mo. R. R., 35 Mo., 352; Lloyd vs. Pac. R. R., 49 Mo., 199; Ellis vs. Pac. R. R., 48 Mo., 231; Powell vs. Hann. & St. Jo. R. R., 35 Mo., 457.)

Vortes, Judge, delivered the opinion of the court.

This action was brought in the Carroll Circuit Court under the provisions of the 43rd section of the act concerning "railroad companies" (Wagn. Stat., 1872, p. 310) to recover

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double damages for the killing of cattle belonging to plaintiff by the defendant upon its railroad.

There are two counts in the petition, but as the judgment was for the defendant on the first count, no notice thereof need be taken.

The second count charges that the engine and cars used by the defendants ran upon and killed one heifer of the plaintiff of the value of fifty dollars, and that another heifer was thereby crippled and damaged to the amount of fifteen dollars; that said cattle were killed and injured by the negligence of the agents of defendant in running said engine and cars; that at the point on said road where said cattle were injured said road was not fenced, and that it was uninclosed prairie land and where there was no crossing of a public highway of any kind, etc. The petition claimed double damages, etc.

The answer of the defendant does not deny that it is a corporation, etc.; but it does deny the other material allegations of the petition.

The case was tried by the court without the intervention of a jury.

The plaintiff introduced evidence tending to prove that the animals named in the petition belonged to the plaintiff, and that he was damaged by the killing and crippling thereof in the sum of from thirty-five to forty dollars; that the injury happened at a point on the defendant's railroad about one hundred yards east of the depot at Wakenda station, in Carroll county, on said railroad; that the railroad switch at said station extended some thirty feet east of where the injury occurred; that the train of cars inflicting the injury was at the time running about the usual speed that such trains run on said railroad; that at the place where the cattle were injured there was no public crossing of any kind; that it was on open, uninclosed lands, and the road was not fenced.

The evidence of the defendant was somewhat variant from that of the plaintiff in reference to the distance of the place where the accident occurred from the *depot* or station, and in reference to the distance to the eastern end of the switch from where the stock were killed.

At the close of the evidence the court at the request of the defendant made the following declarations of law:

"1st.—That if the animals in question were killed or injured within the limits of a station on its railroad, necessarily left open for the transaction of the business of the company and the accommodation of the public, then the plaintiff cannot recover unless the plaintiff shows that the killing or injury was occasioned by the actual negligence of defendant, its agents or servants in the management of the particular train that did the killing."

"3rd—That if the animals in question were killed or injured in the open grounds of defendant, at defendant's station, and it was necessary for the transaction of business with the public, and for its convenience in the reception and discharge of freight and passengers, that such space should be left open, the plaintiff cannot recover, without showing actual negligence on the part of the defendant, its agents or servants."

"8th-That railroad companies have the right to move and operate their trains for the transaction of their business, at such speed as they may deem proper, having due regard to the rights of the public; and if the evidence shows that the animals were killed on defendant's right of way, where its road does not run along or across a public road or street, but within the grounds of a station left open by it for the necessary transaction of its business, and for the accommodation of the public, then the same rule must apply as to animals killed or injured within such grounds, as applies to animals killed or injured at public road crossings; and in order to recover, plaintiff must show that the killing or injury in this case had been occasioned by the neglect of defendant's servants to sound the whistle or ring the bell, or that such stock were killed or injured through the wilful act or neglect of defendant's agents and servants."

The defendant also asked the court to make several other declarations of law which were refused by the court; but as it is thought that they only involve the same principles contained in the instructions given, or are wholly inapplicable to the case, no notice will be taken of them.

No declarations of law were asked for or given on the part of the plaintiff.

The court found for the plaintiff as to the second count of the petition, and assessed his damages at the sum of forty dollars, and rendered a judgment in his favor for a sum double of that amount.

The defendant then filed a motion for a new trial which being overruled he accepted and appealed to this court.

This case, although the petition charges that the cattle were killed by the negligence of the defendant's servants, is a petition founded on the 43rd section of the act in reference to railroad corporations (Wagn. Stat., 310). It is provided by that statute that railroad companies shall fence their roads where the same shall pass through, along or adjoining inclosed or cultivated fields, or uninclosed prairie lands; that "until such fences, openings and gates or bars," etc., shall be duly made and maintained, such corporation shall be liable in double the amount for all damages which shall be done by its agents, engines or cars to horses, cattle, mules or other animals, etc.

The petition, although it has many allegations which detail facts and circumstances which are wholly immaterial to the cause of action under any view of the case, alleges as the cause of action "that the said stock was killed as aforesaid in consequence of the fact that, at the point where said stock strayed on said road, and was killed and crippled, there were no fences or cattle guards or anything else erected by said company to prevent stock from going on said road; that at the point where said stock strayed on said road it was uninclosed prairie land, which said company was bound to fence, and that said stock were killed at a point on said defendant's road where there was no street, county or State road, or public crossing."

These allegations of the petition, together with a prayer for double damages, conclusively fix the character of the action as one founded on the provisions of the 43rd section of the statute before referred to; and the fact that the court rendered a judgment for double the amount of the damages found, shows

that the case was decided under that view of the case. It is true that the instructions or declarations of law given by the court at the request of the defendant, are rather inconsistent with that view of the case. It seems to have been thought that inasmuch as there was an allegation of negligence in the petition, the trial could proceed with a view to recover on the ground of negligence, if negligence was proved; and if negligence was not proved, a recovery could be had on the ground that the injury took place at a point where the road was required to be fenced, when a recovery could be had without proof of negligence for double the amount of the damages done.

The declarations of law given by the court all assume that if the killing of the cattle took place at a point where the company was not required to fence its roads, still plaintiff could recover by proving negligence. This I think was erroneous under the petition in this case. The petition specifically charges that the failure of the defendant to fence its road at a point where by law it was required to have the road fenced, and where the stock were killed, is what caused the injury complained of. In such case no question of negligence could arise and no proof of negligence is necessary. (Biglow vs. North Mo. R. R. Co., 48 Mo., 510; Gorman vs. Pac. R. Co., 26 Mo., 441.)

It follows, therefore that the instructions given were inapplicable to the case and were erroneous, and some of the instructions given were not founded upon any evidence in the case and were, therefore, perhaps improper; but as these declarations of law were asked for by the defendant, of course, he does not complain that they were given.

The only question remaining to dispose of is, whether the court could properly render the judgment rendered under the evidence in the case. If there was no evidence in proof of a material fact necessary to a recovery in favor of the plaintiff, the judgment should be reversed. It was necessary to a recovery on the part of the plaintiff under the 43rd section of the statute before referred to, that the evidence should show

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that the stock were injured at a point on the defendant's road where the road passed along or through inclosed or cultivated fields or uninclosed prairie lands. Now the evidence shows that the lands where the accident occurred were open, uninclosed and uncultivated lands, but after a careful examination of all of the plaintiff's evidence we can find no evidence tending to show that the lands were prairie lands. It follows that no judgment should or could legally have been rendered against the defendant under said 43rd section or under the plaintiff's petition. (Musick vs. A. & P. R. R. Co., 57 Mo., 134.)

The judgment will be reversed and the case remanded; the other judges concur.

MARY E. ENTWHISTLE, Respondent, vs. John M. Feighner, Appellant.

Damages—Action for killing plaintiff's husband—Dying declarations—Res
gestæ.—In suit against a railroad company for the killing of plaintiff's husband, the declarations of the latter immediately after receiving the injuries, as
to the cause of his death, are admissible as a part of the res gestæ.

2. Damages for killing plaintiff's husband—Defendant competent witness—Const. Stat.—In suit of damages against one for killing plaintiff's husband, defendant is a competent witness. In such case there was no contract or cause of action (Wagn. Stat., 1372, § 1), to which the deceased was a party. His death was a sine qua non to the existence of the cause of action.

Appeal from Gentry Circuit Court.

Bennett Pike, with G. W. Lewis, for Appellant.

Collins & Caldwell, with Patton & Loan, for Respondents, cited Looker vs. Davis, 45 Mo. 145; State, etc. vs. Meagher, 44 Mo. 356; Poe vs. Domic, et al., 54 Mo. 123.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought her action under the statute to recover damages of the defendant, for wrongfully killing her husband.

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The only objections urged to the action of the court relate to its rulings, in admitting and rejecting testimony.

Plaintiff gave evidence of the declarations of the deceased husband immediately after he received the injury, and they were objected to, but they were clearly admissible within the principle established in Brownell vs. Pacific R. R. Co., (47 Mo. 239) and Harriman vs. Stowe (57 Mo. 93), and this is conceded by the counsel in his brief.

The defendant offered his deposition in his own behalf, and it was ruled out, for the reason that he was not a competent witness.

The statute (2 Wagn. Stat., p. 1372, § 1) permits parties to testify in suits, "provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor."

In the present case there was no contract or cause of action to which the deceased husband was a party. The proviso in the statute was enacted for the purpose of putting parties on an equal footing, and not allowing a living party to give his version of a contract when he could not be confronted by the other party in consequence of death. When the husband was killed, then it was for the first time that the cause of action accrued to the plaintiff as his widow. Had the husband survived, this action never could have been brought. It is an action in which plaintiff and defendant only could be parties, for it did not arise till after the husband's death. The defendant therefore was a competent witness, and more especially so in this case, as the plaintiff had the benefit of her husband's declarations, and the court erred in ruling otherwise.

The judgment will be reversed, and the cause remanded. The other judges concur.

Surface v. Han. & St. Jos. R. R. Co.

Samuel Surface, Respondent, vs. The Hannibal & St. Joseph Railroad Company, Appellant.

1. Texas cattle—Transportation of from one county to another by new owner after importation—Original introducer not liable.—Where Texas cattle are, during the prohibited season, brought by a railway company into one county of the State, and afterward transported by an owner, having no connection with the road, into another county, such transportation under the law (Wagn. Stat., 251, et seq.) would be a new offense independent of the first, and for disease communicated by the cattle while in the county into which they had been so transported, the company would not be liable. (See Wilson v. Kans. City, St. Jo. & Council Bluffs R. R., ante p. 184.)

Appeal from Grundy Circuit Court.

Willard P. Hall, Jr., with Carr & Oliver, for Appellant.

M. A. Low, for Respondent.

Vories, Judge, delivered the opinion of the court.

This action was brought before a justice of the peace to recover damages of the defendant, for the wrongful shipment by it of Texas cattle to the county of Caldwell, during a period of the year in which said transportation of said cattle to any county of this State is made unlawful.

This case is in most particulars identical in principle with the cases of Husen vs. The Hannibal and St. Jo. R. R. Company, and the case of Wilson vs. Kansas City, St. Joseph and Council Bluffs R. R. Co., decided at the present term. This case, however, has one additional point in it not raised by the record in the cases before referred to. The difference is this: The evidence in this case tends to prove that the defendant shipped Texas cattle for Messrs. Thompson & Taylor, into the county of Caldwell, during a period of the year when it is made unlawful to ship or drive any such cattle into any county in this State; that said cattle were delivered to said Thompson & Taylor in said county of Caldwell; that some time after said cattle had been brought to Caldwell county by the defendant, the owners of the cattle, (Thompson & Taylor) drove said cattle out of the county of Caldwell into

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the county of Davis, and in the vicinity of the residence of plaintiff, and that it was there and by this means that the Texas fever was communicated to the plaintiff's cattle, and for which injury this action is brought.

In view of this evidence the defendant asked the court, among other declarations of law prayed for, to declare the law as follows: "If the court believe from the evidence, that the plaintiff's cattle sued for were infected with and died from the disease, commonly called Texas or Spanish fever, in the county of Davis, communicated to said cattle in Davis county, three or four miles from the line of defendant's railroad, by the Texas cattle of Thompson & Taylor, and by them driven into Davis county, and to the place where said disease was so communicated, the defendant was not liable for this action, and the court should so find."

This declaration of law ought to have been given, but was refused by the court.

The statute, upon which this action is founded, provides that "No Texas, Mexican or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this State, between the first day of March and the first day of November, in each year, by any person or persons whatsoever."* Other sections of the statute inflict penalties on parties for a violation of this law, in driving or conveying such cattle into "any county of this State."

The 9th section of the act, as amended by the act of 1873, provides, that if any person or persons shall drive or otherwise convey any of the prohibited cattle into any county in this State, in violation of the first section of the act, he or they shall be liable in all cases for all damages sustained, etc.

It seems from the foregoing that the statute makes it an offense to remove the prohibited cattle from one county to another county of the State; and makes the party so violating the law liable for all damages, etc.

^{*(}The above extract is an exact quotation from the original Texas cattle law, --Rep.)

Chillicothe Savings Association v. Ruegger, et al.

This action was brought against the defendant for bringing cattle into Caldwell county in violation of the statute. The evidence tends to show that the cattle were afterwards driven by Thompson & Taylor into Davis county, which was a new and independent offense under the statute, and they were made liable under the statute for all damages growing out of this unlawful act. We do not think that it is a proper construction of the statute to hold the defendant liable for the damages growing out of this new and independent violation of the law.

All other questions involved in this case have been fully considered in the case of Wilson v. Kansas City, St. Jo. & C. B. R. Co., decided at the present term.

The judgment will be reversed, and the case remanded. The other judges concur.

THE CHILLICOTHE SAVINGS ASSOCIATION, Plaintiff in Error, vs. Joseph Ruegger, John W. Toppass, et al., Defendants in Error.

Practice, civil—Allegation as to existence of corporation—What sufficient.—
In suit by a corporation, an averrment that plaintiff was a corporation "duly incorporated under and by virtue of an act of the General Assembly of the State of Missouri entitled," etc., was a sufficient allegation of plaintiff's corporate existence.

Error to Livingston Circuit Court.

Collier & Mansur, for Plaintiff in Error, cited Mut. Ben. Life Ins. Co. vs. Davis, 12 N. Y., 569; N. Y. Floating Derrick Co. vs. N. J. Oil Co., 3 Duer., 648; Elizabethport Manuf. Co. vs. Campbell, 13 Abb. Pr., 86; Oswego & Syracuse Plank Road Co. vs. Rust, 5 How. Pr., 390; Pres. U. S. Bank vs. Haskins, 1 John Car., 132, and n. s, p. 135; Ang. & Ames Corp., 9 ed., §§ 632-3, and Van Sank. Plead., pp. 314, 519, 743; Stoddard vs. Onand Am. Conf., 12 Barb., 575.

Chillicothe Savings Association v. Ruegger, et al.

Normille, for Defendants in Error.

Hough, Judge, delivered the opinion of the court.

This was an action on a promissory note alleged to have been executed by the defendants Ruegger, Toppass and Broaddus to the defendant Platter, and by him indersed to the plaintiff.

The petition averred that the plaintiff was a corporation, duly incorporated under and by virtue of an act of the General Assembly of the State of Missouri, entitled "An act to organize savings associations, and to facilitate exchange," approved February 15th, 1864. Defendant Platter objected to this averment as being indefinite and uncertain, in that it failed to state any act or thing done by said plaintiff, showing that it had been legally incorporated, and "because none of the traversable acts necessary to constitute a legal corporation are stated in plaintiff's petition," and moved the court to require plaintiff to make said allegation definite and certain.

This motion was by the court sustained, and the plaintiff declining to plead further, the court dismissed its petition and rendered judgment against it for costs, and plaintiff brings the cause to this court by writ of error.

The corporate existence of the plaintiff was sufficiently alleged. Substantive facts only need be averred, and not the evidence necessary to establish such facts. The motion was frivolous and should have been overruled.

The judgment is reversed and the cause remanded. All the judges concur.

State v. Beazley.

STATE OF MISSOURI, Respondent, vs. THOMAS J. BEAZLEY, Appellant.

1. Foreign fire insurance agents doing business in this State not compelled to obtain licenses.—Since the passage of the Insurance act of 1869, (Wagn. Stat., 732) an agent of a foreign fire insurance company, doing business in this State, is not liable to the penalty fixed by the statute (Wagn. Stat., Art. IV, p. 781, § 4) for failing to procure a State license. § 44, Art. III, of the act of 1869, (Wagn. Stat., 777-8) requiring the payment into the Insurance Department of certain fees and dues in lieu of other taxes, etc., embraced in its operation foreign as well as domestic companies doing business in this State, and had the effect of repeding Art. IV, so far as it required the procurement of State licenses by foreign companies. But such companies will continue liable under Art. IV, for fees, licenses and taxes for county and municipal purposes.

Appeal from Chariton Circuit Court.

Gage & Ladd, for Appellant.

John A. Hockaday, Attorney-General, for State.

Kinley & Kinley, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action instituted in the name of the State by the prosecuting officer of Chariton county, in October, 1873, to recover the penalty fixed by section 8, article 4, of chapter 76, Wagn. Stat., for acting as agent of a foreign fire insurance company, without having first filed a statement and obtained a license.

There were three counts in the petition based upon the violation of the statute for three different years.

The defendant demurred to the petition, and the demurrer was overruled, and, the defendant refusing to answer over, judgment was rendered against him, and the penalty of five hundred dollars was assessed on each count, one-half for the benefit of the State and the other half to the county.

The only question is whether the section under which the proceeding was instituted was repealed or modified by the subsequent act, organizing the insurance department.

The insurance law, adopted by the Legislature, and approved March 10th, 1869, covered the whole subject in refer-

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ence to insurance matters, except that the power of counties and municipal corporations to tax insurance companies, as contained in chapter 90 of the general statutes, was still retained.

The section in respect to taxation (Wagn. Stat., Art. IV, p. 779) provides that "all agencies of foreign insurance companies doing fire, river or marine insurance within this State, shall on or before the first day of February in each and every year, deposit with the assessor of the county, and also of the city in which the office or agency of such company is located, a statement, verified by the oath of the agent of the foreign company, specifying the gross amount (after deducting all return premiums) of premiums received for insurance by such company or agent during the preceding year, up to the first of January immediately preceding such deposit of such statement, or for such fractional part of the year that such company or agency may have been doing business in the State." (§ 1.)

The third section then provides that such gross amount of premiums, so received in the county and city in which the office of the agency is located, shall be subject to the levy and payment of such taxes of every kind, as other property is subject to for State, county and municipal purposes, which taxes shall be paid by such agent to the respective collectors within the time required by law for the payment of the general taxes.

By the fourth section it is declared, that upon the agent or agents of any foreign insurance company depositing with the assessor the verified statement required, and complying with the other provisions of the law, the clerk of the County Court of the county in which such agency is located, shall issue to him or them a license in the name of the State, for carrying on the business of his or their agency for the space of one year, which license, if demanded, shall be renewed from year to year.

The eighth section provides that any agent of any insurance company, not incorporated by the Legislature of the State,

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who shall neglect to comply with the law as embodied in the foregoing sections, or who shall neglect or refuse to take out the required license, shall forfeit and pay the sum of five hundred dollars for each offense, and it is made the duty of the collector of the county in which the office of the agency is located, to prosecute for the recovery of the forfeiture in the name of the State, to the use of the county and State in equal proportions.

These were the essential provisions of the law in respect to licensing and taxing foreign insurance companies before the passage of the present act on insurance. (1 Wagn. Stat., 732.) They still prevail unless altered or repealed by this last named act. As this was the case of a fire insurance company, the

third article applies to it.

The first section of the article says, that any number of persons not less than thirteen in number, a majority of whom shall be citizens of this State, may associate and form an incorporation, association or company for the following purposes, to-wit: First, to make insurance on houses, buildings, merchandise, furniture, and all other kinds of property against loss or damage by fire, etc. The section then enumerates other kinds of insurance in which the companies may engage. Provision is made for the regulation and mode of procedure of these companies, and in a subsequent part of the article the matter of foreign insurance companies is treated of.

The forty-fourth section of the article then declares: "All companies doing business in this State under either of the classes or divisions of insurance business named in the first section of this act, or any part thereof, shall pay into the Insurance Department of the State all the fees and dues as required by the provisions of this act, which shall be in lieu of all fees, dues or taxes to be collected for the benefit of the State under existing laws; but such companies shall, in all other respects, be subject to all existing laws relating to fees, licenses and taxation for county or municipal purposes."

The forty-fifth section of the act provides, that any agent or agents of any insurance company, who shall neglect or re-

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fuse to comply with the requirements of the last preceding section, shall forfeit and pay the sum of two hundred dollars which may be sued for and recovered in the name of the State to the use of the county school fund; and the forty-sixth section repeals all parts of the general statutes, relating to the business mentioned in the first section above referred to, as to companies transacting such business, so far as they are inconsistent with the last mentioned act.

The construction placed upon the forty-fourth section must determine this controversy. That section, if it applies to the company that the defendant represents, adopts a different rule from that under which this prosecution was had, and must necessarily lead to a reversal of the case. It provides that all companies doing business in this State under either of the classes or divisions named in the first section, shall pay into the Insurance Department certain fees in lieu of others previously collected by the State, and the taxes to counties and municipalities shall be the same as had previously been paid.

Defendant's company was doing the business specified under one of the classes or divisions of the first section, but it is insisted that that section only applies to home companies or associations formed under its provisions. But the forty-fourth section says, "all companies doing business in this State," not companies organized under the laws of the State. The defendant's company, though a foreign company, was "doing business in this State," and, therefore, is properly included within the scope of the section. If there was any doubt as to this construction, it is certainly removed by reference to section 31 of the act, which makes the legislative intent very plain. That section declares that every company doing the business mentioned in the first section of the act, or any part thereof, in this State, shall pay to the superintendent of the insurance department the following fees, which shall go to the support of said department: For filing the declaration required by this act on the organization of companies or associations, \$50; for filing statement and certified copy of the charter required of companies not organized under the laws of this

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State, \$50; for filing supplementary, annual statement, \$25, etc. Here the same language is employed as in the forty-fourth section, the words being "every company doing the business mentioned in the first section of the act," and the subsequent provisions of the section show that all companies are embraced, whether home or foreign, that are doing the business designated in this section.

It results, therefore, that this proceeding was unauthorized so far as a forfeiture or penalty on the part of the State was concerned. The companies are still liable under the provisions of Art. IV, for all fees, licenses and taxation for county and municipal purposes according to the forty-fourth section of Art. III, which modifies the section under which the proceeding was instituted.

It follows that the judgment must be reversed and the cause remanded. The other judges concur.

EUGENE L. DEWEY, Plaintiff in Error, vs. Benjamin F. Carey, Defendant in Error.

Bond—Action upon—All obligees must join.—Where an obligation is executed to two or more jointly, all the obligees must sue upon it. They cannot separate the liability and bring an action in favor of each.

Error to Linn Circuit Court.

A. W. Mullins, for Plaintiff in Error.

I. The plaintiff had a right to sue alone. There was no defect of parties plaintiff. The petition shows that the damages claimed by the plaintiff were sustained by him, and not as to any part thereof by Price or Leroy D. Dewey. In such case it is unnecessary to join all the obligees as plaintiffs. (High Inj., p. 558, § 963; Sturges vs. Knapp, 33 Vt., 486; Hill Inj., p. 76, § 26; citing Prader vs. Purkett, 13 Cal., 588.)

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S. D. Pratt & S. P. Huston, for Defendant in Error.

I. There was a defect of parties plaintiff apparent on the face of the petition. The bond given by Carey to Thomas D. Price, L. D. Dewey and plaintiff, vested in them a joint right of action upon its breach—they could not sever and sue separately—bring separate actions. This is well settled as the unvarying rule of common law. (Baker vs. Jewell, 6 Mass., 462; Montague vs. Smith, 13 Mass., 405; Robbins vs. Ayres, 10 Mo., 538; Wells vs. Gaty, 9 Mo., 565.)

II. This rule of the common law has not been changed by our code or statute. (Clark vs. Cable, 21 Mo., 223; Fowler vs. Kennedy, 2 Abb. Pr., 347; Dennis vs. Kennedy, 19 Barb., 517.)

WAGNER, Judge, delivered the opinion of the court.

The petition alleges that defendant instituted a suit by injunction against Thos. D. Price, Leroy D. Dewey and the plaintiff, and that upon his executing a bond to them a temporary injunction was granted; that upon a hearing of the cause the injunction was dissolved and the petition dismissed; but no assessment of damages was had at the time of the dissolution. This action is now instituted by the plaintiff alone on the bond to recover damages for alleged breaches.

A demurrer was sustained to the petition because the other obligees in the bond were not made plaintiffs.

Where an obligation is executed to two or more jointly, all the obligees must sue upon it. They cannot separate the liability and bring an action in favor of each. If the plaintiff can maintain this suit, then Leroy D. Dewey can maintain one, and Thos. D. Price still another, and thus the defendant will be harassed with three suits on the same obligation which was jointly made to the three persons. By our law all contracts are joint and several and a party may sue any one or more debtors against whom he has a demand. But the principle has no application to the obligees in a contract, who must sue jointly as plaintiffs. Where the contract made by the obligor is a joint

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one, one obligee cannot make it a several obligation by suing alone. (Clark vs. Cable, 21 Mo. 223; Robbins vs. Ayres, 10 Mo., 538; Wells vs. Gaty, 9 Mo., 561.)

To permit one party to sue might result in great injury in a case of this kind. One plaintiff might recover the entire penalty of the bond, yet this would be no bar to another action by a plaintiff who was not a party to the suit; and as there could be no apportionment the party would be made liable for obligations that he never entered into. It is true that it may happen in some instances that one obligee has sustained more damage than some of his co-obligees, but this would present no insuperable objection, as under our practice act I think the judgment might be adjusted so as to secure the respective rights of the parties.

The judgment must be affirmed; the other judges concurring.

John F. Husen, Respondent, vs. The Hannibal & St. Jos. R. R. Company, Appellant.

Wilson vs. Kausas City, St. Jo. & Council Bluffs R. R., ante p. 184, affirmed.
 Appeal from Grundy Circuit Court.

Oliver & Carr, with W. P. Hall, for Appellant.

M. A. Low, for Respondent.

Vories, Judge, delivered the opinion of the court.

This case is identical in principle with the case of Reason Wilson vs. Kansas City, St. Jos. & Council Bluffs R. R. Co., decided at the present term of this court; and for the reasons given in the opinion in that case the judgment in this case is also affirmed.

The other judges concur.

WILLIAM R. COALE, et al., Respondents, vs. The Hannibal & St. Joseph Railroad Company, Appellant.

 Railroads—Patent smoke stacks—Fires communicated by particular engine— Proof as to fires caught from other locomotives.—In suit against a railroad company for damage caused by the escape of sparks from a locomotive, testimony offered to prove the insufficiency of the engine or the negligence of the engineer by showing that fire had escaped from other locomotives of a similar pattern was rejected as collateral and incompetent.

2. Action for waste by a tenant at will against a stranger,—A tenant at will or by sufferance is not liable to his landlord for waste committed by a stranger, and will have no action against the stranger therefor.

Instructions calculated to confuse, etc.—Instructions substantially given in another form, and those calculated to confuse or mislead, are properly rejected.

4. Damage—Destruction of property by fire escaping from locomotive—Presumption of negligence.—The settled law of this State is that proof of the destruction of property, by fire escaping from a locomotive, raises a prima facie case of negligence, which defendant must rebut by proof showing absence of negligence. Whether this is done is a question for the jury.

Appeal from Buchanan Circuit Court.

M. Oliver, with W. P. Hall, for Appellant.

The prima facie case of negligence could be rebutted by showing that the locomotive doing the damage had the best and most approved machinery in good condition, and was in the care of skilful and prudent men. (37 Mo., 287; 46 Mo., 456; 45 Mo., 352.) Evidence of fires caused by defendant at other times and places is inadmissible, unless it be shown that the other fires were set by the engine causing the damages complained of. (4 Md., 242; I. Redf. Rail., 476.)

H. M. Ramsay, with W. H. Sherman, for Respondents.

The defendant having introduced testimony tending to show that all its engines had been for four years supplied with the most improved machinery and appliances for preventing fire, and that fire could not escape from its engines, it was competent for plaintiff to rebut that testimony by showing the frequent occurrence of fire produced by defendant's passing engines, provided with the same improved spark arresters.

The instructions given by the court, on motion of plaintiffs, were proper, and presented the law under the facts of the case, and, in connection with the instructions given on defendant's side, presented the case fairly to the jury. (See Fitch vs. Pacific R. R., 45 Mo., 322; Bedford vs. Hann. & St. Jo. R. R., 46 Mo., 456; Clement vs. Hann. & St. Jo. R. R., 53 Mo., 366.)

The court properly instructed the jury that plaintiffs were entitled to recover for the negligent burning of the fence by defendant. Plaintiffs, it is true, were tenants on the farm when the fence was destroyed, but as tenants they were answerable to the landlord for the destruction of the fence. (See Mason vs. Stiles, 21 Mo., 378; 4 Kent Com., 77; Tayl. Ld. & Ten., §§ 178, 344.)

VORIES, Judge, delivered the opinion of the court.

This action was brought to recover damages from the defendant for the burning of several stacks of hay and a string of fence, made of posts and planks, alleged to be the property of the plaintiffs, which, it was alleged, was burned by fire escaping from a locomotive used by plaintiff on its railroad.

The defendant, in its answer, does not deny that it is a corporation owning, using and occupying a railroad as is charged in the plaintiffs' petition; but it denies all other material allegations in the petition.

The case was tried by a jury.

The plaintiffs introduced evidence tending to prove that they jointly owned eight stacks and a large rick of hay, situate a short distance north of defendant's railroad, in Buchanan county, State of Missouri; that there were about forty tons of the hay which was worth from \$8 to \$10 per ton; that on the 20th day of October, 1872, the hay was burned by fire escaping from a locomotive which propelled a train of cars on defendant's railroad, which was run and conducted by the agents of defendant, and which had passed said stacks just before the fire was discovered. The petition alleged that the same fire burned up a fence situate on the farm where the

hay was situated; that the fence was constructed of plank and posts; that the fence and farm on which it was situate were the property of Mrs. Corby; that plaintiffs had rented the farm of Mrs. Corby and were in possession of the same as her tenants; that the fence burned was worth over one hundred dollars; that the fire took place about sundown on the evening of the 20th of October, 1872, and the witness thought that the train which had just passed was a passenger train, but was not certain.

The defendant, on its part, introduced evidence tending to show that locomotive No. 6, on defendant's road, left St. Joseph on the 20th of October, 1872, propelling a train of cars, about thirty minutes after five o'clock in the evening, and passed the point on the road opposite where plaintiffs' hay was situate about six o'clock in the evening; that it was a passenger train; that said locomotive, No. 6, was a good, safe locomotive; that it was supplied with the most modern and safe chimney and spark arrester in use, and was one of the safest contrivances to prevent the escape of fire from a locomotive running on a railroad, now in use. The evidence further tended to prove that the said locomotive, numbered six, was run by a good, safe engineer, and other employees, etc.

On cross-examination of the defendant's witness by plaintiffs' attorney he stated that the defendant had used the same kind of spark arresters on all of their engines for four years, which was used on said engine numbered six. Only the one witness was examined by the defendant and he was shown to be defendant's master mechanic at the west end of its road.

After the evidence was closed on the part of the defendant, the plaintiffs called two witnesses, of whom he asked the following question, to-wit: "Did you, in the fall of 1872, see any other fires, than the one in controversy, along the line of defendant's railroad, in the neighborhood of the fire started by the defendant's engine?" To this question the defendant objected on the ground that the evidence attempted to be elicited was irrelevant and immaterial, and would not tend to prove the condition of the engine from which the fire escaped

which burned plaintiffs' property, or to show that the agents conducting the same, acted carelessly or negligently, or to rebut the evidence of defendant which tended to prove the absence of negligence of the defendant in reference to the engine numbered six, or the agents thereon.

This objection was overruled and the witnesses were permitted to testify that they had known other fires to take place along defendant's railroad in the vicinity of the place where plaintiffs' hay was burned, during the fall of 1872. The defendant at the time excepted.

The court, at the instance of the plaintiffs, gave the jury instructions as follows:

1. "If the jury believe from the evidence, that plaintiffs' hay and fence described in the petition, were burned on or about the time mentioned in the petition, and that the fire which caused the injury sued for was set by or escaped from a railroad engine being run by the defendant on its railroad, then the jury will find for plaintiffs, unless the jury further believe from the evidence that such fire was caused without any negligence on the part of defendant's servants or employees; and the burden of proving such want of negligence rests upon the defendant."

2. "Though the jury believe from the evidence that the engines of defendant were supplied with a 'spark arrester' and other contrivances, to prevent the escape of fire from the engine, of the most approved pattern and style; yet if the jury believe from the evidence that the employees or servants of defendant, operating its locomotive and train of cars at the time of the fire mentioned in the petition, failed or neglected to exercise due care and caution in so operating and running said locomotive and train of cars, and that from such want of due care and caution, the said fire was communicated by said locomotive or train to the hay and fence of plaintiffs, described in the petition, then they will find for the plaintiffs."

4. "The court instructs the jury that if they believe from the evidence that plaintiffs' property was destroyed by fire, thrown from a passing engine of defendant while being run

on defendant's railroad, then the jury may presume negligence on the part of defendant."

5. "If the jury find for plaintiffs, they will assess the damages at the value of the hay and fence at the time it was burned."

6. "The jury are the sole judges of the weight of the evidence, and the credibility of witnesses, and if the jury believe any witness has wilfully sworn falsely about any material fact, they may disregard the whole of such witness' testimony."

The defendant, at the time, objected to all and each of the foregoing instructions, and its objection being overruled it excepted.

The court then, at the instance of the defendant, gave the following instructions:

1. "Defendant is not compelled to provide engines which will absolutely or entirely prevent the escape of sparks or fire, but only such engines as experience has shown to be the best in use."

2. "If the jury believe from the evidence that the damages claimed are caused by the fire escaping from defendant's engine; and find further that the engine was in good order, properly constructed and supplied with the best appliances in use, to prevent the escape of fire, then defendant was not guilty of negligence, in such escape of the fire, and is not liable; unless the fire escaped through negligence of the agents and servants of the defendant in managing the engine and machinery."

3. "The court instructs the jury on behalf of the defendant, that in order to charge the defendant, the plaintiffs must affirmatively show, by a preponderance of evidence, that the fire which caused the damage for which this suit is brought escaped from the engine of defendant."

The defendant also asked the court to give the jury a number of instructions which were refused by the court, among which were the following:

"The court instructs the jury that if they find for the plaintiffs they will not include in their verdict any sum as compensation for fence, fencing boards or fence posts, or for the cost

of erecting a new fence in the stead of the one burned; and as to that item plaintiff cannot recover."

"The court instructs the jury that the burden of proof is upon the defendant, to show the competency and carefulness of its servants and agents, and the proper condition and most improved make of engines and machinery to prevent the escape of fire; that after this has been done, it rests on the plaintiffs to show that the damage complained of by plaintiffs was caused by the negligence of defendant's agents or servants, and that there is no inference in favor of plaintiffs."

The jury found for the plaintiffs and assessed their damages at the sum of three humdred and eighty five dollars, upon which judgment was rendered.

In due time, defendant filed its motion for a new trial, which was overruled by the court and the defendant excepted and appealed to this court.

The first question presented by the record, for consideration in this court, is as to the propriety of the action of the court in permitting the plaintiffs to prove on the trial that other fires had happened along the line of the defendant's railroad during the fall of the year 1872, in the vicinity of the place where the plaintiffs' hay was burned, which was caused by the escape of the fire from some of defendant's engines.

It is insisted by the plaintiffs, that this evidence was admissible to rebut the evidence of the defendant tending to prove the absence of negligence on its part. The evidence in the case clearly shows that if the fire was communicated to the plaintiffs' hay, by sparks or fire escaping from the defendant's engine, it was so communicated from engine numbered six, which had just passed the place when the fire was discovered. The evidence in chief of the only witness examined on the part of the defendant, was directed to the proof of facts to show that said engine numbered six, was a good, safe engine which was supplied with the most approved "spark arrester," and that it was, at the time of the fire, manned by competent and careful servants, etc. The evidence elicited by the cross-

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examination of the witness by the plaintiffs elicited the fact that all the locomotives or engines, used on the defendant's road, were provided with the same kind of "spark arresters."

The plaintiffs, in order to rebut the evidence thus brought out by themselves, claim that they had a right to prove that other fires had occurred along the railroad of defendant, caused by the escape of fire from some of the defendant's engines. This evidence, it seems to me, was collateral to the issues in the case. To prove that some one of defendant's engines was insufficient, or that the hands on some of said engines had so carelessly conducted the same as to permit the escape of fire, is not competent evidence to prove that the persons conducting engine No. 6, on the 20th of October, 1872, were negligent, or that the said engine was insufficient; and said evidence could not be made competent by the attempt thereby to rebut evidence which was wholly immaterial, and which had been elicited by the plaintiffs. The evidence was collateral and ought to have been excluded by the court. (Baltimore & Susquehanna R. R. Co. vs. Woodruff, 4 Md., 242; and cases there cited.)

It is next objected by the defendant that the court, by the fifth instruction given on the part of the plaintiff, told the jury that if they found for the plaintiffs they should find for them the value of, not only the hay burned, but also for the fencing consumed on the farm occupied by the plaintiffs at the same time.

The plaintiffs insist that, as they were tenants of Mrs. Corby, who, it is admitted, was the owner of the farm and of the fencing consumed, they were liable to her for the fence, and were bound to her to repair, although the act causing the waste was committed by a stranger; and that as they are liable to their landlord for the waste committed by a stranger, they have an action over against said stranger, to recover the amount of the damage done by the waste. It may be, and has been so held, that a tenant for life and tenants for years are liable for waste committed during their terms, even by a stranger, or by whomsoever it may be committed, except where it is caused by the

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act of God or the public enemies. (Mason vs. Stiles, 21 Mo., 374; 4 Kent, 77; Davis vs. Smith, 15 Mo., 468.)

It has also been holden that the tenants, being bound to answer in such cases, to their landlord, in the full value of the waste committed, were entitled to recover a like amount against the stranger by whose act the waste was committed. (Austin vs. Hudson River R. R. Co., 25 N. Y. 334; Cook vs. The Champlain Transportation Co., 1 Denio, 91.)

The 10th section of the statute of this State, concerning "contracts and promises," has not changed the law in this respect, at least as to the destruction of fences, etc., on a farm. In the case under consideration, however, the evidence fails to show under what kind of lease or tenancy the plaintiffs were in possession of the land and of the fence destroyed. It is not shown whether they were tenants for life or for years, or whether they were merely tenants at will or by sufferance. It should have been shown, by the evidence, what was the nature of the tenancy by which the plaintiffs held the premises injured; for if they were only tenants at will, they were not liable for waste committed by a stranger. In the case of Harnett vs. Maitland (16 Mason, Mees. & W., 256), the learned judge delivering the opinion, in discussing the very question in this case, remarked, "we are all of opinion, however, that the declaration is defective, on general demurrer, for not bringing the case within the class of persons who are liable for the permissive waste, for want of an averment that the defendant was tenant for life or years, it being agreed on all hands that a tenant at will is not liable for permissive waste."

In the present case, the plaintiffs should have shown, by the evidence, that they held by the kind of tenancy which would make them liable for permissive waste. Having failed to show such tenancy, the court erred in instructing the jury to find the value of the fence, and in refusing to give the instruction asked by the defendant on the same subject.

The defendant also insists that the court erred in refusing the instruction asked by it as secondly copied herein as instructions refused. It is sufficient to say that the principle

attempted to be asserted by that instruction had been better given in the second instruction given on the part of the defendant. The instruction refused was calculated to confuse a jury by its manner of shifting the issues on the different parties. The law, as settled in this State, is, that where it is proved that the property was destroyed by fire escaping from the defendant's engine, a prima facie case of negligence is made out; that the burden is then thrown on the defendant, by its evidence, to rebut the presumption of negligence by showing the absence of negligence. Whether this is done by the evidence is a question for the jury which can be decided by them, without shifting the burden from one party to the other, as the evidence progresses, and as seems to be contemplated by the instruction refused. (Bedford vs. Hann. & St. Jo. R. R. Co., 46 Mo., 456; Clemens vs. Hann. & St. Jo. R. R. Co., 53 Mo., 366, and cases cited.)

The instructions given by the court, when all taken together seem to conform to the law as laid down in the cases above referred to, except the one hereinbefore specially referred to.

For the errors hereinbefore stated the judgment will be reversed and the case remanded; the other judges concur.

HARRIETT DEVORSE, Respondent, vs. John Snider, et al., Appellants.

- Equity—Jurisdiction—Dover—Fraud.—Courts of equity have jurisdiction
 of actions to set aside conveyances obtained by fraud, and to secure assignment of dower.
- 2. Land and land titles—Deed obtained without knowledge of grantor—Assent presumed after knowledge of record and acquiescence in occupation by grantee.—Semble, that although the grantor in a deed does not actually deliver it to the grantee, yet if he is afterwards aware of its being recorded, and of occupation of the land by the grantee for a long period of years, his assent may be presumed.
- Conveyances—Married women—Acknowledgment—Delivery.—The consent of a married woman to the delivery of a deed executed by her, is evinced by her acknowledgment, which is the only way known to our law by which the consent of a femme covert can be exhibited.

Appeal from Holt Circuit Court.

T. H. Parrish, for Appellants.

I. The plaintiff cannot recover in this form of action. She could only sue at law for maintenance or possession, upon-failure of John Devorse or his representatives to perform the conditions of the contract. (Moore vs. Wingate, 53 Mo. 339-441, and authorities cited; Messersmith vs. Messersmith, 22 Mo., 370; Livingston vs. Tompkins, 4 Johns. Ch. R., 415.)

If the facts set up in plaintiff's petition are true, i. e. if her husband died seized of the land, and she has not relinquished her dower therein, then her right to dower upon the death of her husband became absolute, and her right of action in law for the admeasurement thereof or for possession was complete, and her rights in the premises could not be aided or in any manner affected by a court of equity. (Wagn. Stat., 538, §§ 121-4, 127.)

II. Admitting that the deed was not delivered, and that John Devorse, in his life-time, entered upon condition which was never performed, then the title of the land was never vested in him and the title never passed, and the plaintiff had a complete and adequate remedy at law, for the admeasurement of dower. If she had a complete and adequate remedy at law, she cannot invoke the aid of a court of equity. See authorities above cited. (Magnire vs. Tyler, 47 Mo., 115-129; Peak vs. McLaughlin, 49 Mo., 162; Janney vs. Spedden, 38 Mo., 395.)

III. A grantor will not be permitted to put his grantee in possession of real estate under contract, stand by, and permit him to expend money in making improvements, receive the consideration for the land sold, and then treat the whole transaction as a nullity and recover back the land. (Grumley vs. Webb, 48 Mo., 562; Herriford vs. National Bk. of Mo., 53 Mo., 330; Taylor vs. Zepp, 14 Mo., 482; Newman vs. Hook, 37 Mo., 207; Bunce vs. Beck, 46 Mo., 327; St. Louis Gas Light Co. vs. St. Louis, 46 Mo., 121.)

S. W. Collins, for Respondent.

I. As this action was brought by plaintiff to have the deed of Daniel Devorse and plaintiff, his wife, cancelled upon the ground of fraud, a court of equity, and no other, has jurisdiction.

II. The plaintiff had a right to bring her action in chancery to have this deed set aside so that she might afterwards proceed at law to have her dower assigned in the premises. (Davis vs. Davis, 5 Mo., 184; Tucker vs. Tucker, 32 Mo., 464; Teubner vs. Moller, 12 Mo., 528; 18 Mo., 389; 1 Sto. Eq. Jur., 628.)

III. An action for dower is not barred by statute of limitations. (See 32 Mo., p. 357.)

The husband, Daniel Devorse, had no right to deliver or acquiesce in the delivery of said deed when it was contrary to the stipulation upon which plaintiff had been induced to sign and acknowledge it.

Sherwood, Judge, delivered the opinion of the court.

The plaintiff is the widow of Daniel Devorse, deceased, and brought her action to set aside a deed to certain land.

This deed bears date and is acknowledged in January, 1853, recorded in 1859, is in the usual form of deeds with covenants of general warranty, and expresses a consideration of \$200.

The petition charges that this deed was executed and acknowledged by the decedent and herself, and was made in pursuance of a parol contract between her husband and herself and John Devorse, now deceased, a son of her husband, that the son and grantee should, before the deed was delivered to him, enter into a bond to keep and maintain his father and herself during their natural lives; that the grantee never executed the bond, nor provided for their maintenance; that the deed was never delivered, but remained in the possession and control of the grantors, for a long time after its execution, and until the grantee secretly and fraudulently obtained possession.

sion thereof and placed the same on record without the knowledge or consent of either plaintiff or her husband; and that by reason of the premises she was entitled to dower in the land and the equitable relief prayed for.

The defendants are Mary Snider, widow of John Devorse, deceased, and John Snider, with whom she has intermarried since the death of her husband, and Mary and Levi Devorse, jr., minor children and only heirs at law of John Devorse, deceased.

The adult defendants answered, denying the chief allegations of the petition, as to the promised execution of the bond referred to, and as to the non-delivery of the deed, and as to its having been fraudulently obtained, etc.; and as a further defense it was alleged in the answer, that the deed in question was executed and delivered by Daniel Devorse, deceased, and plaintiff, to John Devorse, deceased, in consideration that the latter would discharge certain debts then owed by his father, and would support during their natural lives his father and plaintiff; that these agreements, as to the payment of the father's debts, had been fully complied with during the lifetime of John Devorse, deceased, who, while he lived, provided both his father and plaintiff a good and comfortable living; and after the death of John Devorse the plaintiff was offered both by Mary Snider and her present husband a like good and comfortable home and living, but she refused to accept the same.

Peaceable possession of the land under the deed for over the period prescribed by the statute of limitations by John Devorse, under whom defendants claimed, was also alleged.

The plaintiff denied the allegations of this answer in her reply.

A guardian adlitem, it would seem, was appointed for the infant defendants, but no answer on their behalf was filed; in fact, judgment by default was taken against them.

The court rendered a decree in favor of plaintiff, finding, "that said Daniel Devorse at the time said deed was made, was the owner in fee simple of said land, and plaintiff was in-

duced to sign and acknowledge said deed upon the representations and understanding that she and her husband were to be supported off said place by said John Devorse, and that said deed was not to be delivered or go into effect, until the conditions were complied with, and said John Devorse, secretly and unknowingly, fraudulently obtained possession of said deed, so far as plaintiff was concerned; that the court does further find, that said deed was valid and binding so far as Daniel Devorse was concerned; and that all the interest which said Daniel Devorse then had in said lands, passed by virtue of said deed to said John Devorse."

It was further found "that plaintiff's right of dower in and to said lands did not pass by virtue of said deed," and it was accordingly ordered adjudged, etc., that the deed was fraudulent and void as to plaintiff's right of dower, and was to be for naught held so far as concerned that right and its enforcement.

There is no doubt but that courts of equity in cases of this character have jurisdiction. (Davis vs. Davis, 5 Mo., 183; Swaine vs. Perine, 5 Johns. Ch., 482.)

And the doctrine is broadly asserted, that courts of equity, aside from cases involving accident, mistake, or fraud, have concurrent jurisdiction with courts of law in all cases of dower. (1 Sto. Eq. Jur., § 626.) How far this doctrine is susceptible of qualification, owing to the existence of special statutory regulations, it is unnecessary now to determine. It is enough to say that there is no validity in the objections which have in the present instance been raised to the petition on the score of jurisdiction.

The court below in effect found that the deed was delivered with the consent of Daniel Devorse; and the testimony, although not showing an actual delivery by him of the deed, yet shows that after ascertaining that it had been recorded, his assent thereto was evinced in a variety of ways, for a long period of years, during which time John Devorse cultivated and improved the place and acted as its owner, if a preponderance of the testimony furnishes any guide to such conclu-

sion. And the consent of the plaintiff to the delivery of the deed, was shown by her acknowledgment thereof; the only mode known to our law whereby such consent on the part of a femme covert can be exhibited. (1 Wagn. Stat., p. 275, §§ 13, 14.)

It was therefore wholly immaterial whether the plaintiff, after duly acknowledging the deed, gave her subsequent verbal assent to its being recorded, or whether such recording

took place without her knowledge.

It is not intended to deny that circumstances might arise in which a court of equity would feel impelled to interfere, when an attempt was being made to defraud a wife of her dower—for dower is favored in equity as well as at law;—but such a state of facts is not presented by the evidence before us. There are, it is true, some circumstances not altogether free from suspicion attendant on the recording of the deed, as shown by the expressed wish of John Devorse to keep the fact of the deed having been put to record a secret; but there were so many motives which may have prompted the grantee to secrecy, that we will not assume from that circumstance alone that the design was in contemplation of defrauding the plaintiff of her dower, and it is only upon this theory that the decree of the trial court can be upheld.

The testimony tends strongly to show that the deed in question was made to defraud the creditors of the grantor, as shown by his repeated declarations to that effect; but this affords no ground for declaring the deed inoperative to pass

dower.

Nor could we uphold the decree entered below, even were it based on the theory of the defendant's answer, as it does not appear from the testimony of any witness when the contract referred to was made, nor with any degree of certainty, what were its terms. If made subsequently to the delivery, as it certainly was subsequently to making the deed, it would, aside from any objections which readily occur in reference to the statute of frauds, be void for lack of consideration. If on the other hand, the supposed contract were made at the same

time as the deed, the admission of the former would overthrow the rule which forbids the incorporation of a contemporaneous and incongruous parol agreement with the terms of a written instrument. (Huse vs. McQuade, 52 Mo., 388; 1 Greenl. Ev., § 277.)

Again, the finding of the court shows that a contract, utterly incapable of performance, was entered into between the contracting parties; for, if the "deed was not to be delivered or go into effect until the conditions were complied with," and those conditions could not be fulfilled till the death of both plaintiff and her husband, it is extremely difficult to see who would perform the friendly office of delivering the deed to the grantee. (3 Washb. R. Prop., p. 254, 20a.)

Judgment reversed. All concur.

LYMAN W. DINSMORE, Respondent, vs. Livingston County, Appellant.

1. Contract—Work done for county under—Approval of by Commissioner—Allegation as to—Suit on quantum valebat—Opinion of Commissioner in case of.
—In suit against a county under a contract for public work, where by the terms of the agreement the work was to be done to the satisfaction of a commissioner, his approval must be alleged and proved, unless plaintiff claims that his rejection of the work arose from caprice or malice, and was without foundation; in which case such fact may be alleged and a recovery still had in equity. Were the action brought against the county merely on the quantum valebat, the opinion of the commissioner would have no more binding authority than that of any other witness.

2. County bridge—Opening of with consent of county—Claim for damages against builder—Waiver of.—The mere fact that a county bridge is thrown open to public travel with the consent of the County Court, does not constitute a waiver on the part of the county of a claim of damages against the builder for delay in finishing it.

3. Parol agreement as to interest not binding, when.—Proof of a parol understanding that the borrower of money should pay ten per cent. interest thereon, is incompetent. Such an agreement, in order to have binding force, should be in writing. (Wagn. Stat., 783, § 2.)

16-vol. Lx.

Appeal from Daviess Circuit Court.

Collier & Mansur, for Appellant.

I. A fair construction of the statute (Wagn. Stat., 783, § 2), does not require that the payor any more than the payee (who in notes never does) shall sign the writing.

II. Respondent, in open County Court, contracted with appellant to pay ten per cent. The contract was entered of re-

cord, and was necessarily in writing.

M. A. Low, for Respondent.

I. It required a promise in writing to make plaintiff liable

to pay ten per cent. interest.

II. The instructions, declaring that the bridge must have been completed to the entire satisfaction of the road commissioner, were properly refused. As the county concluded to accept and complete the bridge, it did not matter whether the bridge commissioner was satisfied or not.

NAPTON, Judge, delivered the opinion of the court.

This was an action to recover a balance alleged to be due from Livingston county, on a contract for building a bridge across Grand River, at a point called Jimtown.

The petition averred a compliance with all the conditions

of the contract.

The answer denied this and set up as a counter-claim, or alleged breaches of the contract sued on; first, that the bridge had not been completed according to the contract, and the specification therein, and that the county had to expend \$1,724.06 to complete the bridge; second, that the county advanced to the plaintiff \$1,000 as part payment, for which said plaintiff agreed to pay 10 per cent. interest until the completion of the bridge, and that the plaintiff has not finished the bridge, nor has it been accepted by the county, and there is due from plaintiff the sum of \$650 as interest; third, that an additional \$1,000 was advanced, for which interest is claimed as due, amounting to \$640; fourth, that the plaintiff

by the contract agreed to build a breakwater of stone, at the center pier of the bridge, but failed to do so, by which defendant was damaged \$2,000; fifth, that plaintiff agreed to build the center pier of said bridge upon the bed rock of the river, if the same could be found, if not found, then to drive piles if bottom could be found in which they could be driven deep enough to hold them, otherwise to build a crib or platform of timber laid crosswise on each other to make a foundation; but plaintiff did not build said pier in either of said modes, but built on a foundation of cross timbers laid upon a sand bar; that by reason thereof the bridge was unsafe, and it became necessary to rip-rap the pier, which rip-rapping cost the defendant \$1,412.25, and the defendant claims damages for \$5,000; sixth, that the plaintiff by contract was required to complete the bridge on or before the first day of March, 1867, which was afterwards extended by defendant's consent to January 1st, 1868, but the bridge was never completed, and the defendant was damaged thereby in the sum of \$2,500.

There was a replication filed to all the new matters alleged in the answer; and a trial before a jury, and the plaintiff had a verdict for \$1,345.

It is unnecessary in the view we have taken of the case, to recite the testimony on the trial, which was somewhat conflicting.

The instructions given to the jury were generally correct. The main questions of law presented by the record depend upon the propriety of the second and fourth instructions given for the plaintiff, and the rejecting of the sixth asked by defendant, and upon the exclusion by the court of certain orders entered on record by the County Court of Livingston County, in regard to the payment of interest on an advance of \$2,000 to plaintiff before the completion of the bridge.

The second instruction given was, "The court instructs the jury that the term, to the complete satisfaction of the commissioner,' used in the contract, means according to the contract and specifications in a thorough and substantial manner."

Where parties agree to abide by the decision or opinion of an architect, engineer or commissioner of any kind, in regard to the correspondence of the work done with the contract, in an action on such contract, the approval of the person selected by both parties to determine this, must be averred and proved. If the disapproval or rejection of the work arises from caprice or malice, and is really without foundation, such facts may be alleged and a recovery still be had in equity. (2 Sto. Eq., 1457a-1457b; Herrick vs. Belknap, 27 Verm., 673; Neenan vs. Donoghue, 50 Mo. 495; Estel vs. St. Louis & S. E. R. Co., 56 Mo., 282; Yeats vs. Ballentine, 56 Mo., 531; Lowe vs. Sinklear, 27 Mo., 309.)

In an action for the value of the work and materials, the opinion of the commissioner would be entitled to no more weight than that of other witnesses. (Yeats vs. Ballentine, 56 Mo., 531.)

As this was an action on the contract, the second instruction was wrong, and if the contract, in fact, required the work on this bridge to be done to the satisfaction of the commissioner, the error of this instruction would require a reversal of the judgment; but after a very careful examination of the contract and specifications, as found in the record, I have been unable to find any such requisition in either. It seems strange that the counsel on both sides and the court should have agreed that these terms were in the contract; but, as copied in the record, the words "to the satisfaction of the commissioner" are found only in one of the specifications in regard to another bridge with which this controversy has nothing to do. The instruction was therefore a harmless abstraction.

The fourth instruction given for the plaintiff is as follows: "The court instructs the jury, if they find from the evidence that the plaintiff Dinsmore completed said bridge according to the contract and specifications in a thorough and subtantial manner, on or about the 26th day of May, 1868, and the county of Livingston, by permitting the same to be used by the traveling public, and by exercising other control over said bridge, accepted the same, then the jury will find for the plaintiff."

The sixth instruction asked by the defendant, and refused by the court, was this: "It is admitted by the pleadings that the bridge was to be finished for public use on or before the first day of January, 1868, and if the jury believe from the evidence that the plaintiff did not complete said bridge at or before said date, they will find for defendant, upon its counter-claim, in that behalf, such damages as, from all the facts and circumstances in evidence, they may believe defendant has sustained by reason of the failure of the plaintiff to complete said bridge on or before said 1st day of January, 1868."

The fourth instruction, copied above, seems to assume that the reception of the bridge, indicated by allowing the public to pass over it, and by the court, through the commissioner or road overseer, proceeding to have certain work done on what was thought to be defective about the abutments and middle pier of the bridge, was a waiver of all damages resulting from the delay of the plaintiff for four months and upwards, in the completion of the bridge. It is not very apparent what damages this delay could have occasioned, except in the additional work, the cost of which the court allowed the county in other instructions; but the sixth instruction should have been given because the facts authorized it, and it was unquestionably the law.

There was in fact no formal acceptance of the work. The plaintiff was notified to do certain work about the middle pier and the abutments, which he declined or failed to do; and, thereupon, the County Court had the work done by others. The commissioner, it seems, was dissatisfied with the bridge. The mere fact that the public used the bridge by consent of the court, and of the plaintiff, could hardly be regarded as a waiver of a claim of damages occasioned by delay, if any such were sustained. The County Court, as agents for the county, would hardly be authorized to prohibit travel over a bridge, because they had a claim against the builder for his not completing the bridge within the time specified in his contract; and opening the bridge to the public is no indication of an abandonment of any claims reserved for consideration in a final settlement with a contractor.

Townsend Adm'x, etc., v. Townsend.

The rejection of certain records of the County Court, in which advances of \$2,000 to the plaintiff are recited to have been made, with the understanding that the plaintiff would pay 10 per cent. interest on them till the contract was completed, was in our opinion right.

The second section of our statute concerning interest (Wagn. Stat., p. 783) provides that "parties may agree in writing for the payment of interest, not exceeding 10 per cent. per annum, on money due, or to become due, on any contract." These orders of the County Court did not bind the plaintiff. His reception of the money advanced could not create such an obligation. It must be in writing, and of course the party to be bound must indicate his obligation in writing; but there was no written obligation on the part of the plaintiff to pay this interest.

It is unnecessary to notice the affidavits filed with the motion for a new trial, on the ground of newly discovered evidence, as the case must be remanded.

Judgment reversed and the case remanded. The other judges concur, except Judge Sherwood, absent.

SARAH K. TOWNSEND, ADMINISTRATRIX, ETC., Appellant, vs. John H. Townsend, Surviving Partner, etc., Respondent.

1. Courts, Probate—Final settlement—Subsequent litigation in the Circuit Court by original suit res adjudicata.—A final settlement in a Probate Court, as to matters within its jurisdiction and in issue, is conclusive between the parties unless reversed or set aside on appeal; and the same issues cannot be afterward litigated by an independent proceeding in the Circuit Court. Nor can the same issue be so litigated pending such an appeal.

Appeal from Chariton Circuit Court.

L. H. Waters, for Appellant.

A final settlement may be reviewed and impeached for fraud. (Jones vs. Brinker, 20 Mo., 87; State, to use, vs. Roland, 23 Mo., 98; Sullivan Co. vs. Burgess, 37 Mo., 300.)

Townsend Adm'x, etc., v. Townsend.

Charles A. Winslow, for Respondent.

The matters complained of in the petition were all once tried in the Probate Court, and a judgment rendered on them, which remains unreversed and is conclusive. The evidence discloses no fraud or collusion in procuring it, and for any mistake of law or fact the Probate Court may have made in the premises, it cannot be disturbed in this proceeding. (Lewis vs. Williams, 54 Mo., 200, and cases cited.)

VORTES, Judge, delivered the opinion of the court.

In May 1866, Luke Townsend and John H. Townsend, formed a partnership by which they sold goods in the town of Brunswick, Chariton county, until February, 1867, when Luke Townsend died.

After the death of Luke Townsend, Sarah K. Townsend, the plaintiff, administered on his estate; and John H. Townsend, the defendant, under the provisions of the statute of this State, administered on the partnership effects of said firm; and on the 13th of July, 1871, after giving the notice required by law, made his final settlement in the Probate Court as such administrator.

This suit was brought to set aside said final settlement, and to have an account taken of the partnership effects, etc., on the ground that the final settlement was fraudulently procured.

The grounds of fraud relied on by the plaintiff in her petition, are, that the defendant omitted to include in his inventory, part of the partnership effects; that he falsely represented by said inventory that he was the owner of an undivided half of the property and effects of said partnership, when the fact was to the contrary thereof; that he had failed, in his different settlements with the Probate Court, to account for the property and effects named in his inventory; that in his said settlements, he had credited himself with larger amounts than he was entitled to, and had failed to charge himself with proper amounts of interest, etc.

Townsend Adm'x, etc., v. Townsend.

The defendant in his answer denied all fraud and all allegations in the petition charging improper conduct on his part; and then, as a defense to plaintiff's action, averred that the Probate Court of Chariton County had full jurisdiction over said estate and over all of the settlements of defendant in reference thereto; that he had conducted the administration of said estate before and in said Probate Court; and had made his different settlements with said court, including his final settlement which was made with and approved by said court; that when his final settlement was made in said court. the plaintiff appeared by attorney and contested the making or approval thereof; that on said final settlement, all of the matters and things contained in the plaintiff's petition were duly presented to, heard and determined by said court, and that the judgment of said court, so rendered, was final on the subject, and was a full and final determination of each and all of the matters and things aforesaid; that said judgment was not procured by the fraud of defendant and still remains unreversed, etc.

The only answer made to this last defense set up in the answer, by the plaintiff's replication, is, that she denies that the settlement was made in good faith, or that it was correct, or that she is barred from having and maintaining her action to falsify the same because of the action of the said Probate Court thereon.

The court, upon a hearing of the case, found for the defendant and dismissed plaintiff's petition.

The plaintiff made a motion for a re-hearing, which being overruled she appealed to this court.

The judgment in this case must be affirmed on two grounds if not others: 1st. It stands admitted by the pleadings that the same matters sought to be litigated here and brought in question in this case were presented, heard and determined in the Probate Court, upon the final settlement sought to be set aside, and that the plaintiff was a party thereto contesting the said matters with defendant in said court.

Lindell v. Rokes.

The Probate Court having jurisdiction of the matters then passed upon, its judgment rendered in the case became final and conclusive between the parties, unless the same had been reversed or set aside by appeal or otherwise, by a court having appellate jurisdiction for some error in the cause. (Lewis v. Williams, 54 Mo., 200.)

2nd. It is shown by the certified transcript from the records of the Probate Court, read in evidence by the plaintiff, that an appeal to the Chariton Circuit Court was asked for by the defendant and allowed by the court from the judgment rendered by the Probate Court, upon the final settlement sought to be set aside for fraud in this case; and for all that appears in the case, said appeal is still pending and undetermined.

For the reasons above stated it becomes wholly unnecessary to investigate the other points which have been argued in this case.

The judgment will be affirmed. The other judges concur.

CHARLES LINDELL, Respondent, vs. HENRY ROKES, Appellant.

Promissory note—Abstinence from drink a good consideration.—A promissory
note made payable on condition that the payee shall, during a specified time,
abstain from intoxicating liquor, imports a sufficient consideration to sustain
an action, on proof that its terms have been complied with; and the consideration is not illegal as against public policy. (See Wagn. Stat., 270, 2 6.)

Appeal from Nodaway Circuit Court.

Dawson & Edwards, for Appellant.

There is no mutuality in the conditions of the contract sued on. Lindell does not promise to abstain from drinking intoxicating liquors or beer during the period mentioned in the contract, nor does he stipulate to do anything whatever. There is no promise, for a promise shown in the instrument, and it is a nudum pactum. (Burnet vs. Briscow, 4 Johns., 235; 2 Kent Com., 464; 1 Sto. Contr., [4 Ed.] § 431; White vs. Bluett, 24 Eng. Law & Eq. Rep., 434; Tyhes vs. Dixon,

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9 Ad. & El., 693; 1 Pars. Contr., 458, n. 2.) A mere moral obligation is insufficient. (1 Sto. Contr., [4 Ed.] 453, 465, 466; Smith vs. Ware, 13 Johns., 257; Edwards vs. Davis, 16 Johns., 280; Chit. Contr., [5 Eng. Ed.] 51, 52; Kick vs. Merry, 23 Mo., 73; Dodge vs. Adams, 19 Pick., 429; Mills vs. Wyman, 3 Pick., 207.)

The consideration being duly expressed in the instrument, parol proof was not admissible to aid it. (Maigley vs. Hauer,

7 Johns., 340.)

There was no evidence to show that the smallest advantage had accrued to defendant from the performance of the contract by defendant. (Sto. Contr. [4 Ed.] 431, and cases cited and note.)

The promise to pay the \$50 by the execution of the instrument, did not operate as a vested gift of that sum. (Powell vs. Brown, 3 Johns., 100; Fink vs. Cox, 18 Johns., 145; Reason vs. Reason, 7 Johns., 26; Taylor vs. Staples, 5 Am. Rep., 556.)

Appellant relies especially on Burnet vs. Briscoe, supra, and Utica & Syracuse R. R. Co. vs. Syracuse, 21 Wend., 139.)

C. A. Anthony, for Respondent.

The instrument sued upon as the foundation of suit, is a promissory note, and being in writing, imports a sufficient consideration. (Wagn. Stat., 270, § 6; Caples vs. Branham, 20 Mo., 246-7; Crow vs. Harman, 25 Mo., 419-20; Chit. Contr. 10 Am. Ed., 26.)

The promise is not void for want of mutuality. (Rose vs. Railroad Co., 31 Tex., 49; Des Moines Valley R. R. Co. vs. DeGuff, 2 Ia. 99; quoted 5 Am. Law Review, 488; Crow vs. Harman, supra; Caples v. Branham, supra; 10 Am. Lead. Cas., 75, 113.)

WAGNER, Judge, delivered the opinion of the court.

This was an action commenced by the plaintiff against the defendant on a promissory note, of which the following is a copy:

Lindell v. Rokes.

"\$50. MARYVILLE, Mo., July 1, 1872.

I promise to pay Charles Lindell fifty dollars (\$50) March 1st, 1873, if he, during the time from July 1st, 1872, to March 1st, 1873, will not use intoxicating liquors and beer of any kind.

Н. Кокев."

The cause was tried before a jury, and evidence was adduced showing that plaintiff had not used intoxicating liquor or beer of any kind during the period specified in the note, and there was a verdict and judgment in his favor.

Defendant objected to the introduction of any evidence by the plaintiff, on the ground that the note was illegal for want of mutuality and consideration. The same objections were also made in the shape of instructions; but they were overruled.

It is true that the plaintiff did not undertake, in direct terms, to do anything when the note was made, but the prevailing doctrine now is, that if one promise to pay another a sum of money if he will do a particular act, and he does the act, the contract is not void for want of mutuality, and the promiser is liable, though the promisee did not at the time of the promise engage to do the act; for upon the performance of the condition by the promisee, the contract becomes clothed with a valid consideration, which relates back and renders the promise obligatory.

Our statute provides that all instruments of writing made and signed by any person or his agents, whereby he shall promise to pay to any other or his order, or unto bearer, any sum of money or property therein mentioned, shall import a consideration, and be due and payable as therein specified. (1 Wagn. Stat., 270, § 6.)

The note imported a consideration, and it was only incumbent on the plaintiff to show that he had complied with its terms. The case of Hempler vs. Schneider (17 Mo., 258) is in point. There Schneider promised to pay Hempler, for Wilhelm Nauman, the sum of two hundred dollars for goods received, in case Nauman did not return to St. Louis within

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fifty days. It was held that Schneider was liable for the full amount of the note, whether Hempler sustained any damage by Nauman's not returning within the time or not. court," said Scott, J., "is not aware of any law which would justify it in releasing men from their lawful contracts, unless in cases of fraud, imposition, accident or mistake in their creation. The plaintiff may have sustained no damage in consequence of Nauman not having returned in fifty days, but there was a sufficient consideration for his undertaking, and he must abide the consequences of his own bargain deliberately entered into." So, where the defendant promised to pay the plaintiff one hundred dollars if a certain county road was not opened or kept open, or if the plaintiff should have the proceedings opening it annulled, it was decided that the promise, it being in writing, was within the statute, and imported a sufficient consideration. (Crow vs. Harman, 25 Mo., 417.)

The note of itself, in the present case, imported a good consideration, and it requires no argument to combat the position that a promise made in consideration that a person shall abstain from the use of intoxicating liquor is illegal as against public policy.

The judgment should be affirmed, and with the concurrence of the other judges it will be so ordered. The other judges

concur.

THE NATIONAL INSURANCE COMPANY, Appellant, vs. Alston Bowman and Vincent Bowman, Respondents.

Pleadings—Allegations as to corporate existence in suit by company on contract,
etc.—One having made a contract with a company, in its corporate name,
thereby admits that it is duly constituted a body politic and corporate, at the
time, and is estopped from setting up for defense by way of demurrer or otherwise, the non-allegation of these facts by the company in suit on the contract.
And in such suit the company need not state where it has its residence or
principal place of business.

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- 2. Promissory note given by partners—Allegation as to partnership, what sufficient.—In suit on a promissory note given by co-partners, the allegation that the makers were co-partners and signed their names as such, is sufficient without the further allegation that they were co-partners for business purposes or were known as such.
- 3. Practice, civil—Demurrer by one defendant—Judgment for both, when improper.
 —Where one of two defendants demurs to plaintiff's petition, and the demurrer being sustained, plaintiff refuses to answer, it is error to give judgment against him in favor of both defendants.

Appeal from Caldwell Circuit Court.

Low & Dilley, for Appellant.

L. C. Page, for Respondents.

WAGNER, Judge, delivered the opinion of the court.

The petition alleged that the plaintiff was a corporation duly organized under the laws of the State, and that at the time of the execution of the note defendants were co-partners, doing business under the firm name of A. & V. Bowman, and that defendants by their firm name made their promissory note, by which they promised, for value received, to pay plaintiff, etc.

To this petition, one of the defendants demurred and assigned as reasons of objection: 1st. That the petition did not allege that the plaintiff was a corporation at the time the note was given. 2nd. The petition did not state where or in what State the corporation was instituted or organized. 3rd. It did not appear where the corporation had its residence or principal office; and 4th. That it was not alleged that defendants were co-partners for the purposes of doing business as such or that they were known as such.

This demurrer was sustained and plaintiff refusing to amend judgment was given in favor of both defendants.

The demurrer was frivolous and devoid of merit. The defendants having entered into the contract with the company, in its corporate name, thereby admitted it to be duly constituted a body politic and corporate at the time. (Farmers, &c. Ins. Co. vs. Needles, 52 Mo., 17, and cases cited.)

They were estopped from averring anything against its existence, and it made no difference where its principal office was located. The petition alleged that the defendants were copartners, and that they signed the note in their firm name and that was sufficient.

Moreover, it was error to give judgment in favor of both defendants, when only one of them filed the demurrer.

The judgment must be reversed, and the cause remanded; all the judges concur.

NICHOLAS O. WILLIAMS, Respondent, vs. C. R. McGuire, et al., Appellants.

1. Equity—Title to land in third party cannot be set up, when.—A. having a title bond for certain land, and having paid the purchase price, conveyed the same to B., but the deed was not recorded. B. sold the tract to C., and returned the deed to A. with directions to cancel it, and make a conveyance directly to C., and such deed was accordingly executed with full covenants and for adequate consideration. In a suit by C. for a specific performance of his contract by A., wherein B. asserted no claim, held that parties having knowledge of the deed to plaintiff could not attack his title on the ground that A., by his deed to B., had divested himself of title, and that the return of the instrument did not re-invest it in A.

Appeal from Gentry Circuit Court.

Lewis. with Loan, for Appellants.

I. All the right of Phillips that could be transferred by a deed—whatever that right was—passed to Taylor by the deed to him, made by Phillips, and was not divested by the return and cancellation of the deed. (Tibeau vs. Tibeau, 19 Mo., 78.)

J. P. Caldwell, with J. C. Howell, for Respondent.

I. Plaintiff had no notice of the deed to Taylor, and it was not recorded; and Phillips not having the legal title, his deed to Taylor never placed the legal title in Taylor. Hence, the destruction of the deed did not leave the legal title in Taylor or his heirs.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding in the nature of a bill in equity against Cornelius R. McGuire, Brannock Phillips, Joseph Degginger, Charles H. S. Goodman, John A. Hundley and George S. Hundley.

The charges in the petition were, that on or before the 27th day of March, 1857, the defendant, McGuire, was seized and possessed in fee simple of certain lands lying in Gentry county, and that on the day last named he entered into a contract with the defendant, Phillips, for the sale and conveyance of the same for the price of sixteen hundred dollars, which Phillips at the time paid; that, at the time, McGuire executed to Phillips a title-bond, obligating himself to make a deed for the premises on or before the first day of May, 1857; that afterwards, on the 20th day of April, 1858, for and in consideration of the sum of twenty-six hundred dollars, paid by plaintiff to Phillips, the said Phillips sold and conveyed by a deed with full covenants of warranty, the lands in question to plaintiff, and all his right, title and interest therein, by virtue of his contract with McGuire; that plaintiff entered into possession of the land, and that McGuire failed to make and execute a conveyance of the same to Phillips, or the plaintiff as grantee and assignee of the right, title and interest of Phil-

It is further averred, that on the 6th day of June, 1870, the defendants Joseph Degginger and John A. Hundley, with full knowledge of all the facts, and of the legal and equitable rights of Phillips and the plaintiff, and in fraud of the rights of the plaintiff, purchased from McGuire, for a merely nominal consideration, by a quit-claim deed, the lands in controversy; and that afterwards, on or about the 11th day of June, 1870, the defendants, Charles H. S. Goodman and George S. Hundley, also having full knowledge of all the facts and of the legal and equitable rights of Phillips and the plaintiff, and in fraud of the same, purchased from Degginger and John A. Hundley, an undivided half of the lands at a merely nominal consideration, and received a quit-claim deed therefor.

There was a prayer that the contract, on the title-bond, might be specifically performed; that the Hundleys, Degginger and Goodman might be declared trustees for the plaintiff, and also might be ordered to convey to him by quit-claim, whatever supposed interest they might have.

McGuire and Phillips made no answer, and as to them there was a judgment by default. The other defendants answered, denying all the material allegations in the petition, and set up other matters which were stricken out as redundant. They also set up the statute of limitations; and that in 1871, before this suit was commenced, Phillips made with the plaintiff a full settlement of all sums coming to plaintiff on account of any supposed defect in the title to these lands. These last averments were also stricken out.

There was no error in the action of the court in striking out portions of the answer. The parts thus disposed of were wholly redundant. They either had no relevancy to any issue that could arise in the case, or they were sufficiently pleaded before, and the defendants had the full advantage of every defense they presented on the hearing.

It is idle to talk about the statute of limitations constituting any defense. The plaintiff acquired his title in 1858, and appointed an agent to attend to the land for him and pay the taxes; and the evidence shows that the land was assessed in his name and he paid taxes continuously on it up to 1872, when this suit was brought. Whatever title defendants had was acquired in 1870, and there is no pretence that they had any adverse possession previous to that time. So that under no circumstances could the statute of limitations be invoked in their favor.

As to the alleged agreement between plaintiff and Phillips it could not be taken advantage of by defendants. Phillips made no answer, and there was no privity between him and defendants.

The court rendered a decree for the plaintiff and found the facts to be, that McGuire, on the 27th day of March, 1857, sold the land for sixteen hundred dollars to Phillips, who paid

all the purchase money; and that McGuire executed to Phillips a title bond agreeing to make him a deed for the land with full covenants of warranty; that afterwards, on the 20th day of April, 1858, Phillips, for the consideration of twentysix hundred dollars, paid to him by the plaintiff, sold and conveved the land to plaintiff by deed with full covenants of warranty; that McGuire never made a deed to the land to either Phillips or plaintiff, and that on the 6th day of June. 1870, the defendants, Joseph Degginger and John A. Hundlev, having full knowledge of all the facts, and of the legal and equitable rights of Phillips and plaintiff, as the grantee and assignee of Phillips, and in fraud of plaintiff's rights, purchased from McGuire, for a merely nominal consideration as compared with the true value of the land, a quit-claim deed of conveyance to themselves, and that on or about the 11th day of June, 1870, defendants, Goodman and George S. Hundley, also, having full knowledge of all the facts above recited, and in fraud of the rights of the plaintiff, purchased from Degginger and John A. Hundley the one undivided half of the land and received from them, for a merely nominal consideration a quit-claim deed of conveyance.

An examination of the evidence fully and abundantly sustains the decree of the court.

There was evidence given to show that Phillips sold the land to one Taylor, but that Taylor's deed was never recorded, and that he sold the land to plaintiff, and then returned his deed to Phillips with directions to destroy the same and then ordered Phillips to make the deed direct to plaintiff; and it is now argued that the returning and cancellation of the deed from Taylor to Phillips did not have the effect of re-vesting the title in Phillips, and hence he could convey no title. It is a sufficient answer to this to say, that the source of title from which both plaintiff and defendants claim was McGuire, and that he executed his title bond to Phillips for the conveyance of the land and received the purchase money. The record shows a regular conveyance from Phillips to plaintiff for a full and adequate consideration. If Taylor or his heirs have any in-

terest in the land, or claim any title thereto, it will be time enough to determine the same when they appear in court for that purpose.

It would be entirely useless to attempt to give a summary of the evidence. That the defendants, when they purchased, had notice of plaintiff's title is too clear to admit of doubt. The title bond from McGuire to Phillips and the deed from Phillips to plaintiff were both of record; and, moreover, the testimony is exceedingly clear that they had actual notice of plaintiff's title. They bought for a merely nominal consideration by quit-claim, from a dishonest man, in the hope that their title might be of value. They show no rights for a court of equity to protect.

The judgment should be affirmed; all the judges concur, except Judge Sherwood, who is absent.

MARTHA A. BARKER, Plaintiff in Error, vo. Stephen Circle, Defendant in Error.

- 1. Acknowledgments—Form of, in conveyances of land partly owned by wife and partly by husband, what sufficient.—Lands owned by the husband and those owned by the wife in fee, may be embraced in the same conveyance; and under the Statute of 1855, the wife was not required to make two acknowledgments, one for her own lands, and one relinquishing her dower in the lands of her husband. Nor was it essential that a single acknowledgment should contain distinct references to the lands owned by the wife and those owned by the husband. A single acknowledgment would suffice. The clause relinquishing her dower will be held applicable to all lands in which she had dower, and surplusage as to all lands owned by her in fee.
- 2. Deed by married woman having only equitable right—After-acquired title of —Ejectment brought under—Estoppel under former covenants—Claim of defendant for affirmative relief in such suit, etc.—A married woman bought and paid for, and entered upon and permanently improved, certain land, but took no deed therefor; subsequently, conjointly with her husband, she conveyed the same by deed of trust with covenants of warranty, and after sale and purchase under the trust deed, being at that time discovert, obtained from her vendor a quit-claim deed for the property.

Held, That her covenants in the trust deed would not estop her from maintaining ejectment on an after acquired title, paramount to the right conveyed by her; but the legal title received by her from her vendor, the right to which she had previously acquired by her purchase and possession, was, in equity, in her hands, or in the hands of those having notice of her purchase and subsequent conveyance, subordinate to the right transferred by her deed of trust.

Where suit in ejectment is so brought, although defendant might properly ask to have plaintiff's title vested in himself, yet his failure to do so would not impair his right to hold possession against plaintiff claiming under that title with notice of defendant's equity.

Error to Carroll Circuit Court.

Kinsey & Mirick, for Plaintiff in Error.

I. The acknowledgment was not in conformity to the law in force at the time of its execution and does not pass the wife's interest in land. (See Chauvin vs. Wagner, 18 Mo., 546; McDaniel vs. Priest, 12 Mo., 546.) In those cases the deed embraced but one tract owned by the wife, and the Court say that the words, "and relinquished her dower," may be stricken out as superfluous; but in this case, as the land belonged both to husband and wife, the words, "and relinquished her dower," cannot be stricken out as superfluous, because they are the words required by the statutes to pass the dower, and the only construction that can be placed upon the words, is, that they are words of limitation upon the effect of the preceding acts of the wife in making the acknowledgment, and restrict the same to the relinquishment of dower and nothing else.

II. Plaintiff in error being a married woman at the time of the execution of the deed of trust, is bound by none of the covenants therein contained, and is not estopped, after the death of her husband, from setting up an after-acquired title to the said land. (See 17 Johns, 166.)

III. Defendant attempts, in his answer, to set up an equitable defense, but the matters therein set forth would entitle him to no relief in a proceeding to acquire the legal title. (Shroyer vs. Nickell, 55 Mo., 269 and cases there cited.)

IV. If the answer does present an equitable defense to our legal title, defendant should ask that the same be decreed to him.

Ray & Ray, for Defendant in Error.

I. Under our law, an equitable title is a good defense to an action of ejectment, if properly pleaded. (See 20 Mo., 108; 27 Mo., 263; 19 Mo., 78; 47 Mo., 227 & 130; 42 Mo., 138 & 568; 39 Mo., 24.)

II. The mere addition of the words "and relinquishes her dower" in the certificate of a married woman's acknowledgment of a conveyance of her own estate, will not avoid the deed as to her. (Perkins vs. Carter, 20 Mo., 465; 23 Mo., 223; 44 Mo., 65; 56 Mo., 196; 18 Mo., 531; 19 Mo., 425; 11 Ill., 123.)

III. Whoever is capable of making a valid disposition of property may create a trust and grant a power of sale. Such trust and power of sale are valid when executed by a married woman, to secure the debt of her husband, or the contingent liability of his endorsers. (11 Am. Law Reg., 651, § 5; Kinner vs. Wash, 44 Mo., 65; Hill Tr., 46—421 and note; Young vs. Guff, 28 Ill., 20; 2 Wash. Real Pr., 80.)

IV. The doctrine of estoppel, by warranty, applies to cases of conveyances of their lands by married women joining with their husbands. (See 3 Washb. Real Pr., p. 106, § 43; p. 234, § 23, [3 Ed.]; Doane vs. Wilcut, 5 Gray, 328, 332; Colcord vs. Swan, 7 Mass., 291; Wagn. Stat., 273, § 2; R. C. 1855, § 3 [on Conveyances]; 8 Ohio, 222; 10 Metc., 192.)

V. If any person shall convey any real estate, by conveyance purporting to convey the same in fee simple absolute, and shall not, at the time of such conveyance, have the legal title, but shall afterwards acquire it, the legal title subsequently acquired shall pass to the grantee, etc. (R. C., 1855, p. 355, § 3; p. 234, § 23; 3 Washb. Real Pr., 106, § 43; 5 Gray, 328; 7 Mass., 291.)

Hough, Judge, delivered the opinion of the court.

This was an action of ejectment brought in the Carroll Circuit Court, for the recovery of the possession of one hundred and twenty acres of land in section 9, T. 51, R. 22.

The defendant, in his answer, set up in substance the following facts: That, in the year 1840 or 1841, the plaintiff, then being a married woman, purchased the property in controversy from one Robert H. Courts, who was at that time the owner thereof, and paid for the same, with her own money, the sum of five dollars per acre, and went into possession thereof, under said purchase, and, thereby, became entitled to a deed, from said Courts, for said premises; that on the 19th day of August, 1859, the plaintiff, jointly with her husband, Samuel Barker, executed and delivered a certain trust deed, whereby they conveyed to one R. D. Ray, as trustee, the premises sued for, and other real property which belonged to her husband, to secure certain parties, therein named, against loss and damage, by reason of their being sureties on a certain promissory note, therein described, and executed by said husband. Said trust deed expressly provided, that in the event of the failure of said Samuel Barker, to pay or cause to be paid the said note by the 1st day of April, 1860, the said trustee should proceed to sell the property described in said trust deed, at the court-house door in the town of Carrollton, first giving twenty days' notice, and apply the proceeds, as therein directed; that said note was not paid or caused to be paid, by said Barker, at the time specified, and the said trustee, afterwards, on the 19th day of March, 1864, in pursuance of the provisions of said trust deed, sold said property, and made, executed and delivered a deed therefor, to the purchaser at said sale, under and from whom, the defendant, by sundry mesne conveyances, claimed title and was in possession thereof, and had made lasting and valuable improvements; that after said sale, and about the year 1865, said Samuel Barker died, and afterwards, to-wit, on the 15th day of September, 1869, the plaintiff herein, with full knowledge of the sale under said trust deed, and of the purchase and possession of the defendant, and of the improvements made by him, procured from said Courts and wife, a quit-claim deed to herself for the premises in suit, for the nominal consideration of four dollars, but really in consideration of the previous purchase and payment

of the purchase money by plaintiff, in 1840 or 1841. The defendant further stated that the plaintiff had no other or further title to the premises, or right to the possession thereof, than as stated in his answer; and that the legal title so taken by her, was with full knowledge and in fraud of defendant's rights, and denied that plaintiff was entitled to the possession, or that he, the defendant, unlawfully detained the same from her.

The deed of trust was set out in full in the answer of the defendant and the certificate of acknowledgment thereof is as follows:

State of Missouri, County of Carroll.

Be it remembered that Samuel Barker and Martha A. Barker, his wife, who are personally known to me, Clerk of the County Court, in and for Carroll County, State of Missouri, to be the persons whose names are subscribed to the foregoing instrument of writing as parties thereto, this day appeared before me and acknowledged that they executed and delivered the same, as their voluntary act and deed, for the uses and purposes therein contained. And the said Martha A. Barker, being by me made acquainted with the contents of said deed or instrument of writing, acknowledged on an examination apart from her said husband, that she executed the same, and relinquishes her dower in the real estate, therein mentioned, freely and without compulsion or undue influence of her said husband.

Attest, etc., etc.

To the sufficiency of the defendant's answer, there was a demurrer, which was overruled by the court, and final judgment rendered thereon for the defendant; and plaintiff has brought the case here by writ of error.

Two points only are insisted upon here, by the plaintiff in error, for the reversal of the judgment of the Circuit Court: First, that the certificate of acknowledgment is insufficient to pass the right of the wife to the premises sued for; and, Second, that the legal title, derived from courts, under which

the plaintiff seeks a recovery in this action, is an after-acquired title, which she is at liberty to assert against the defendant, notwithstanding her covenants in the trust deed, she having been at the time they were made, a married woman.

On the first point, we hold, that lands owned by the husband, and lands owned by the wife, may be embraced in the same conveyance; and it was not necessary, under the statute in force at the time of the execution of the deed in question, that the wife should make two acknowledgments. one for her own lands, and one relinquishing her dower in her husband's lands; nor was it essential that a single acknowledgment should contain distinct references to the lands owned by the wife and those owned by the husband. A single acknowledgment, like the one under consideration, will suffice; the clause relinquishing her dower will be held applicable to all lands in which she had dower, and surplusage, as to all lands owned by her in fee. Under the General Statutes of 1865, now in force, there is but one form of acknowledgment provided for a married woman; the wife's acknowledgment of a conveyance of her own lands and that of lands in which she has dower only, are precisely the same, and the certificate of the officer taking such acknowledgments, is the same in both cases.

The question of after-acquired title as generally understood and discussed in the books, does not arise in this case.

If the plaintiff had, during coverture, conveyed to the defendant, a defective legal title, and had, afterwards, acquired a paramount title, she would not have been estopped, by any covenants she might have made in such conveyance, to maintain ejectment against the defendant on such after-acquired title, nor would it have passed, under our statute, to her grantee. (Reese vs. Smith, 12 Mo., 344.) Or, if she had conveyed to the defendant, as in the present case, her equitable right to the land and a consequent right to call on her vendor for the legal title, and had afterwards acquired a legal title, paramount to that of her vendor, she could undoubtedly have asserted that title against the defendant, notwithstanding her

covenants. But in the case presented she has not acquired any title paramount to that conveyed by her, but one which is in equity, subordinate thereto, in her hands, or in the hands of any one having notice of the defendant's rights, acquired through her conveyance to the trustees.

It is evident that Courts, who sold the land in question to the plaintiff, received the purchase money and put her in possession thereof, could not have maintained ejectment, on the legal title retained by him, against the plaintiff's husband in his lifetime, or against her after his death. All the rights which the plaintiff and her husband had to the land, including the possession, were by and under the trust deed, and subsequent conveyances, transferred to, and vested in, the defendant. Courts could not, therefore, have maintained ejectment against the defendant on the naked legal title, retained by him. The plaintiff, having received, after she became discovert, the same legal title from Courts, to which the defendant had acquired a right through the sale under the trust deed executed by her, could occupy no better position than Courts did; and she cannot, therefore, maintain ejectment against the defendant.

It would have been entirely proper, and might have been prudent, for the defendant to have asked, in his answer, that the title held by the plaintiff should be vested in him; but that he did not do so, will not, under previous decisions of this court, in any degree impair his right to hold possession against the plaintiff claiming under that title, with notice of the defendant's right in equity, to have it conferred upon him. It would be much better practice, in all such cases as this, to ask affirmative relief, in analogy to the old form of proceeding, when law and equity were administered by distinct tribunals, and thereby conclude the litigation in a single suit.

The judgment of the Circuit Court will be affirmed; all the judges concur.

Franklin Lester, Respondent, vs. Kansas City, St. Joseph & Council Bluffs Railroad Company, Appellant.

1. Railroads—Escape of cinders.—In suit against a railroad for damages alleged to have been caused by sparks escaping from a locomotive, it is error—after evidence, by a defendant, of a proper equipment and careful management of the engine causing the fire—to permit proof, in rebuttal, of other fires produced by sparks escaping from defendant's engine. The sufficiency of the equipment and management of the engine occasioning the fire, is the only matter then in issue. (Coale vs. Hann. & St. Jo. R. R. Co., case p. 227.)

2. Damages—Railroads—Escape of fire from locomotive—Variance—Amendment.—Where the petition charges a railroad company with carelessly permitting fire to escape from its locomotive, proof that fire was thrown out, would amount only to a variance, which, at most, would require an amendment of plaintiff's petition. (Wagn. Stat. 1033, § 1.)

 Practice, civil—Instructions—Misleading—Refusal of.—Instructions not based on testimony and calculated to mislead the jury, should be refused.

Appeal from Holt Circuit Court.

Stringfellow & Hall, for Appellant.

Zook & Van Buskirk, for Respondent.

Hough, Judge, delivered the opinion of the court.

This was an action for damages occasioned by the destruction of certain property of the plaintiff by fire, which it was alleged the defendant, negligently and carelessly, permitted to escape from its engines, whilst engaged in running and operating its railroad in Holt county.

It appears from the testimony, that about the 9th day of October, 1873, soon after a freight train of the defendant passed the premises of the plaintiff, a fire broke out in the dry grass, on open and uncultivated prairie lands, adjacent to defendant's track, which fire was communicated, by high winds, to the premises of the plaintiff, and destroyed a considerable quantity of hay and oats, and other articles of a different character.

The plaintiff traced the fire to the place where it began, about an hour and twenty minutes after its occurrence, and there found, as he testified, a partly consumed lump of coal, about the size of his fist, which "had melted and run together in a mass," and which he picked up and found to be still so hot, that he could not hold it.

No witness testified positively as to the origin of the fire, or as to where the burning coal came from.

The testimony of the defendant tended to show that it had, on the engine drawing the train which passed immediately before the fire and was supposed to have occasioned the burning, the best smoke-stack in use, which was furnished with the most approved spark arresters; that the flues in the smoke-stack were not more than two inches in diameter; that the spark arrester was in good condition and its interstices were not of greater diameter than from three-sixteenths to one-quarter of an inch; that the fire box had a grate beneath it, with openings one-quarter of an inch only in diameter, and was so constructed that no cinders could escape from it to the track; that no burning coal, or cinder was taken by any one from the fire box of said engine, while passing the place where the fire originated, and that the engineer, in charge of the engine, was a competent and careful man.

The court permitted the plaintiff to prove, in rebuttal, that other fires had been occasioned, in that neighborhood, about that time, by sparks, emitted from passing engines belonging to the defendant; to the admission of which evidence, the defendant objected, and excepted, on the ground that it was incompetent, irrelevant, inapplicable to the issues made by the pleadings, and calculated to prejudice the jury against the defendant; and for the further reason, that it put in issue the equipment and management of all defendant's engines, in the month of October, 1873.

The court, of its own motion, gave three instructions, the first of which, in substance, directed the jury: That if they believed from the evidence that the fire which caused the damage, escaped or was thrown from defendant's engine, through the carelessness and negligence of defendant's servants, or the insufficient or defective character of the machinery used, and occasioned the injury complained of, they should find for the plaintiff.

The second instruction was to the effect, that it devolved upon the plaintiff to show, by a preponderance of testimony,

that the fire which burned plaintiff's property, escaped, or was thrown, from defendant's engine, through the negligence of defendant's servants, or by reason of the inadequacy of the apparatus employed to prevent the escape of fire, when controlled by careful and competent servants.

The third told the jury, that if they found that plaintiff's property was burned by fire, which escaped, or was thrown, from defendant's engine, they were at liberty, if in their opinion the facts warranted such inference, to infer that the fire resulted from the negligence or carelessness of the defendant or its servants.

The defendant asked eight instructions, three of which were given, the fourth and fifth were modified by the court, and the sixth, seventh and eighth were refused. There was a verdict and judgment for the plaintiff, and defendant has appealed to this court.

The court erred in permitting the plaintiff to introduce testimony as to the occurrence of other fires, occasioned by sparks escaping from defendant's engines. This very point was passed upon in the case of Coale et al. vs. The Hannibal & St. Joseph R. R., decided at the present term.

It appeared in that case, that the fire occurred on October 26th, 1872, and was supposed to have been occasioned by sparks which escaped from engine No. 6. A witness for the defendant had testified, that the engine from which the fire had escaped, was supplied with the most approved spark arrester and manned by competent and careful servants. On cross-examination, the plaintiffs elicited the fact, that all other engines of the defendant were provided with similar contrivances, to prevent the escape of fire, and then introduced evidence of other fires which occurred along the line of defendant's road about the same time, and which were caused by the escape of fire from defendant's engines.

On this point Judge Vories, who delivered the opinion of the court, says: "This evidence, it seems to me, was collateral to the issues in the case. To prove that some one of defendant's engines was insufficient, or that the hands on some

of said engines had so carelessly conducted the same, as to permit the escape of fire, is not competent evidence to prove that the persons conducting engine No. 6, on the 20th of October, 1872, were negligent, or that said engine was insufficient; and said evidence could not be made competent by the attempt thereby to rebut evidence which was wholly immaterial, and which had been elicited by the plaintiffs. The evidence was collateral and ought to have been excluded by the court."

It is objected to the first and second instructions given by the court, that they were not warranted by the pleadings; that the issue raised by the pleadings was, whether the defendant had carelessly and negligently permitted fire to escape from its engines, and not whether fire had been thrown from its engine by its servants.

There was really no testimony that the burning cinder, which caused the fire, was thrown by defendant's servants,

from the passing engine.

The testimony of defendant's witnesses tends to show that it was impossible for the cinder, on account of its size, to have escaped through the grating under the fire box, or through the flues, or netting in the smoke stack, and the testimony that it was not taken from the fire-box by the defendant's servants, was the only testimony on this subject, and this, as appears from the record, was brought out by the defendant itself.

If testimony had been offered on that point, by the plaintiff, tending to show that it was thrown out by the defendant's servants, it would only have amounted to a variance, which if deemed material by the defendant, would, upon a proper showing, have authorized the court to require the plaintiff to amend his petition, and the defendant would then have been permitted to make its defense thereto. (2 Wagn. Stat., 1033, § 1.) But as there was no evidence tending to show that the servants of defendant threw from the engine the burning cinder which caused the fire, the instructions, given by the court, should not have submitted that question to the jury. To do

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so, was to mislead the jury into the belief that there was evidence on which they might find that fact and base their verdict upon it.

The third instruction, given by the court, was further objectionable in that it excluded from the consideration of the jury the testimony, introduced by the defendant, to rebut the inference of negligence, arising from the escape of the fire.

It is unnecessary to comment on defendant's fourth and fifth instructions. They were properly refused, as asked, and were correctly qualified by the court.

The sixth, seventh and eighth instructions, asked by defendant, related to alleged negligence, on the part of the plaintiff, in failing to remove the dry grass between his premises and the defendant's track; but as they did not conform to the rule on that subject laid down in Fitch vs. The Pacific Railroad, (45 Mo., 322,) they were properly refused.

The judgment will be reversed and the cause remanded; all the judges concur.

Jesse D. Ross, Administrator of J. T. Ross, Dec'd, Appellant, vs. William H. Alleman, Respondent.

Administrator—Personal judgment against for costs—When improper.—In suit
brought by an administrator upon a cause of action which accrued during the
lifetime of his intestate, the administrator is not personally liable for costs.
The judgment on that score should be against him in his representative capacity, to be satisfied out of the assets of the estate.

Appeal from Caldwell Circuit Court.

Dunn & Johnson, for Appellant.

In suits brought by an executor or administrator upon contracts made with the testator or intestate in his lifetime, if he fails to recover he is not liable de bonis propriis. (Wooldridge vs. Draper, 15 Mo., 470; Laughlin vs. McDonald, 1 Mo., 684; Ranney, Adm'r, vs. Thomas, 45 Mo., 111; State vs. Maulsby, 53 Mo., 500; Finney vs. State, 9 Mo. 225.)

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J. M. Hoskinson, for Respondent.

I. The matter of costs, in a case like this, is left pretty much to the discretion of the trial court.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff, as administrator, commenced this action in the Circuit Court, on a demand which accrued to his intestate in his lifetime.

A motion was filed to compel him to give security for costs, on the ground that he was unable to pay the costs, and that the estate which he represented, and for which he sued, was insolvent. Without hearing any evidence on this motion the court sustained it, and the plaintiff refusing to give security, the suit was dismissed and a personal judgment was rendered against him.

The judgment is erroneous. The cause of action accrued to the plaintiff's intestate in his lifetime, and in such a case the plaintiff, as administrator, was not personally liable for costs. The judgment should have been against him in his representative capacity, to be satisfied out of the assets of the estate. (Wooldridge vs. McDonald, 15 Mo., 470; Ranney vs. Thomas, 45 Mo., 111; State, to use, &c., vs. Maulsby, 53 Mo., 500.)

As a general rule administrators prosecuting actions in their representative characters, are not required to give bonds for costs or appeals, for the reason that they have already given bonds, with approved security, to answer for all damages or liabilities touching their acts as such. If their bonds are insufficient, the proper mode is to move, in the Probate Court, to have them made good.

The judgment should be reversed and the cause remanded; all the other judges concurring.

MARY E. TURNER, BY HER NEXT FRIEND, et al., Respondents, vs. John A. Hall, Appellant.

Limitations, statute of—Adverse possession, what necessary to defeat an action
of ejectment.—Adverse possession in order to defeat an action of ejectment,
must be, for ten years prior to the institution of the suit, an open, notorious
and continuous occupancy of the land, or some part thereof, under color of
title to the whole, and must be taken in good faith, under a claim adverse
to plaintiff and those from whom he derives title.

 Color of title, deeds relied on to show should be taken in good faith—Instructions as to color of title.—The question whether deeds relied on as color of title were taken in good faith is rightly submitted to the jury. And they

should be particularly told what constitutes color of title.

- 3. Adverse possession-Acts to establish may be determined in part from character of the land—What sufficient.—In determining the question of adverse possession, the jury may take into consideration the nature and situation of the land. And the placing of deeds on record, passing over the tract, employment of agents living in the neighborhood to look after it and prevent trespasses upon it, payment of taxes continuously under claim of title, and the like, may be considered by them; and it is not always necessary to prove actual occupation by the claimant; but the acts referred to would not be sufficient of themselves to establish title by reason of adverse possession, unless the land was unsusceptible of more definite and actual possession, or such acts were known to the party holding the legal title, and known to have been done under claim of adverse title.
- Adverse possession, constructive—Recent decisions as to.—The later decisions
 of this court manifest no disposition to multiply those evidences of adverse
 possession which tend to give it a constructive character.

Appeal from Nodaway Circuit Court.

Heren & Rea, for Appellant.

Dawson & Edwards, for Respondents.

Hough, Judge, delivered the opinion of the court.

This was an action of ejectment, commenced in 1872, to recover a tract of land in Nodaway county.

In 1849, Benjamin Holland, who lived in Kentucky, entered through his son, Perry Holland, who lived in Nodaway county, Missouri, the land in controversy, and on the 2nd day of October, 1854, a patent issued from the United States to Benjamin Holland for said land.

In 1848, Perry Holland married Letha J. Dinning, and in 1849, a son was born to them, named William B. Holland.

Perry Holland died in 1859, and his widow, in 1865, married William G. Turner, and in 1867, a daughter was born to them named Mary Elizabeth Turner.

On the 28th of December, 1870, Benjamin Holland conveyed the land sued for to his grandson, William B. Holland.

In 1871, William B. Holland died intestate and without issue, leaving his mother, Letha J. Turner, and his sister of the half blood, Mary Elizabeth Turner, as his only heirs, and they, together with William G. Turner, husband of Letha J. Turner, are the plaintiffs in the present action.

The defendant pleaded an adverse possession by himself and his grantors, under color of title, for the statutory period, and introduced in evidence, a warranty deed from Perry Holland and his wife to Prince L. Hudgins, dated April 25th, 1850, and recorded April 23rd, 1855; also, a warranty deed from Prince L. Hudgins and wife to Jeremiah Hall, dated September, 21st, 1860; also, a warranty deed from Jeremiah Hall to John Hall and Harvey D. Hall, dated October 3rd, 1867, and a deed from Harvey D. Hall and wife to John A. Hall, the defendant, dated February 3rd, 1872. There seems to be a mistake, in the deed from Holland to Hudgins, in the description of part of the land; but, under the view we take of the case, it is of no moment. The remaining deeds correctly describe the land sued for.

There was testimony to show that in 1850, and soon after the conveyance to him, Hudgins took possession of the land and put a tenant thereon, who cultivated between twenty and thirty acres, that being the amount inclosed, and remained there until the spring of 1851. From 1852 until 1866, no person lived upon the land, nor was it cultivated or inclosed, or used or occupied in any way. In the year 1855, Hudgins, who did not live in Nodaway county, employed a person who lived in the neighborhood of the land, as his agent, to look after it, protect it against trespassers and make sale of it. This agent testified that he acted for Hudgins, and it appears that he ne-

gotiated the sale to Jeremiah Hall; but what the extent, character and publicity of the supervision exercised by him over the land, were, this record does not disclose. Soon after Jeremiah Hall purchased the land, he requested a neighbor to look after it and prevent any trespass thereon. Jeremiah, John A. and Harvey D. Hall paid taxes on the land from 1860 until 1873, except for the year 1863. Benjamin Holland paid taxes for a year or two after the land was entered, and in the year 1866 it seems to have been assessed to him. From 1860 to 1862 it was assessed to Hall; for the year 1862 to unknown owner; for the year, 1863, 1864 and 1865 to Hall. There is nothing in the record to show that the conveyance from Hudgins to Holland and the subsequent conveyances in the defendants'claim of title, were recorded, though it is so stated in appellant's brief.

In the fall of 1866, John Hall went upon the land, built a twostory dwelling, stable and blacksmith shop, and made other valuable and permanent improvements, and continued in possession until the institution of this suit.

There was testimony to show that Hudgins and the Halls, took their conveyances with full knowledge that Benjamin Holland owned the land and had a patent therefor.

Hudgins died in 1872 and this cause was not tried until 1874.

An attempt was made to impeach the genuineness of the deed to Hudgins by Mrs. Turner. On cross-examination, she stated that her signature to the deed looked like her signature to a letter of hers exhibited to her; that she had no recollection of having signed the deed, though she may have done so; that the name of her husband did not seem to be in his handwriting.

She further stated that Hudgins and her husband had dealings with each other, and that Hudgins defended her husband, in 1849, in a criminal prosecution against him.

Numerous instructions were asked and given, and there was a verdict and judgment for the plaintiff, from which the defendant appealed to this court.

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The question of the estoppel of Letha J. Turner and Mary Elizabeth Turner, to assert any title to the land in controversy in consequence of the covenants contained in the deed from Perry Holland and wife to Prince L. Hudgins, was attempted to be raised by the defendant's answer. This plea was very imperfectly drawn and need not be further noticed, as William B. Holland, under whom plaintiffs claim, did not derive his title from Perry Holland, and there was neither allegation nor proof of any assets having descended to him from his father.

During the progress of the trial, a letter was offered in evidence, written by Mrs. Letha J. Holland to one Peatree, in the year 1850, but subsequent to the date of the conveyance made by her husband and herself to Hudgins, which contained nothing of consequence, save a reference to a letter inclosed therein, which she there stated was from Benjamin Holland and which she wished to have shown to Mr. Hudgins.

A letter dated November 1st, 1850, signed "Thos. H. and Benjamin Holland" was offered at the same time, as being the letter referred to in Mrs. Holland's letter, in which a willingness was expressed to make a deed to Perry Holland or to Hudgins for the land, and which spoke of the land as Perry's land. Both these letters were excluded, and the defendant excepted. Benjamin Holland's deed to William B. Holland offered in evidence, was signed with his mark and his deposition in the cause was similarly attested. There was no testimony that the letter or the signatures were in the handwri. ting of either Benjamin Holland or Thomas F. Holland. The only testimony as to the authenticity of the letter was, that it was found among the papers of Prince Hudgins after his death, but not inclosed in Mrs Holland's letter. Mrs. Turner, formerly Mrs. Holland, testified that it was not in the writing of Thomas F. Holland, and that she did not recognize it as the letter inclosed by her.

Peatree, who delivered to Hudgins the letter from Mrs. Holland and the letter she inclosed, also failed to identify it, and stated that it was not the letter received and delivered by

him. The defendant having failed to make a prima facie case as to the authenticity of the letter, the court could not do otherwise than exclude it. This letter having been properly excluded, the letter of Mrs. Holland is of no importance.

The only point remaining to be considered is as to the propriety of the instructions given by the court on the question of adverse possession. The character of the possession to be taken and held by one claiming land under color of title, in order to bar the rights of the true owner, has not been defined with any great degree of precision. From the necessities of the case and the nature of the subject, it has always been treated, when abstractly discussed, in very general terms. Each case must, in a large measure, depend on its own peculiar circumstances. Under the decision of this court in the case of Draper vs. Shoot, (25 Mo., 197.) actual occupation is not always indispensable. But then its absence, it would seem, should be supplied by some act done, on or about the land, which would give some notice of an adverse claim. It would be a new and dangerous doctrine, to hold that a possession under color of title, may be discontinued after a year, or a month, or a week, and that, thereafter, the constructive possession of the land would follow the color of title instead of the true title, provided the disseizor did not intend, in withdrawing from the actual possession, to give up all claim to the land; although no vestige of such adverse occupancy remained upon the land, and no act was thereafter done, save the payment of taxes, of a character calculated to give notice to the true owner of an adverse claim. Such, we understand, is the position assumed by appellants' counsel in argument. We cannot indorse it. The only actual possession taken or held, in this case, by Hudgins, was in 1850 and 1851, prior to the emanation of the patent from the United States, which was in The actual occupancy, it is claimed by the respondents, cannot, under the decision in the case of Gibson vs. Chouteau. (13 Wall., 92.) he taken in consideration, in ascertaining the character and extent of the adverse possession, avail-

able to the defendant, in this action. It will not be necessary to say anything upon this point, as the possession of Hudgins during that time was not excluded from the consideration of the jury.

The instructions given by the court at the instance of the plaintiffs, were substantially correct. They declared in effect that the plaintiffs were entitled to recover, unless the jury found that the defendant, and those under whom he claimed title to the premises, had been for a period of ten years prior to the institution of this suit, in the open, notorious and continuous possession thereof, or of some part thereof under color of title to the whole, taken in good faith, claiming the same adversely to the plaintiffs, and those from whom they derived their title.

The instruction given as to color of title, is not entirely free from objection, as to form—some question having been made as before stated as to the genuineness of the deed from Holland and wife to Hudgins. The jury were told in substance, that unless Hudgins believed said deed to be genuine, it did not constitute color of title. This was instructing the jury, by way of inference, as to what constituted color of title. They should have been more pointedly instructed as to that matter, but as no objection is made here on this account, and counsel do not claim that the jury were misled thereby, we do not feel that we would be warranted in reversing the judgment for this defect. The question of the good faith of the defendant, and those under whom he claimed, in taking the conveyances relied upon as color of title, was properly submitted to the jury.

The court of its own motion gave the following instruction:

"To make good the defense of the defendant under
the statute of limitations, or claim of adverse possession,
the jury must find that the defendant, or those under
whom he claims, themselves, or by their agents or tenants,
had actual, continuous, visible possession of the land in controversy, under color of title to the whole, claiming the same
adversely to the plaintiffs and those under whom they claim
title, for ten years next before the commencement of this suit

or for a period of ten years continuously at some period before the commencement of this suit. This possession is not constructive, but it must have been by occupation or cultivation, if the lands were adapted to or susceptible of cultivation, or by other acts of ownership upon and in relation to said land, which were visible, notorious and continuous for the period of ten years, such as that if the true owner had visited said land, he would have been advised thereby of the claim and possession of the same. The fact that those under whom the defendant claims, may have put deeds upon record, passed over the land, and employed agents in the neighborhood to look after it and prevent trespasses upon it, and paid the taxes upon it continuously, under claim of title to the land, are proper to be considered by the jury, in determining the question of possession and ownership; but these facts would not, of themselves, be sufficient to invest the title in the defendant under the claim of adverse possession, unless the land was not susceptible of a more definite and actual possession, or unless such acts and claim of ownership were known to the party holding the legal title, and known by him to have been so done under a claim of title adverse to his right or title."

The following instruction was given at the request of the defendant:

"It is not necessary in all cases to the setting up of adverse possession, and the running of the statute of limitations, that there need be a fence, building, or other improvement made; and it suffices for this purpose, that visible and notorious acts of ownership are exercised over the lands in controversy, for ten years or more, with the knowledge of an adverse claimant, without interruption or an adverse entry by him; such acts are evidence of an ouster of a former owner, and an actual adverse possession against him, provided the jury should think that the property was not susceptible of a more strict or definite possession than had been taken and held; that neither actual occupation, cultivation or residence

are necessary, where the property is so situated as not to admit of any permanent, useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. The jury, in determining adverse possession, may take into consideration the nature and situation of the land, and in determining that question, the assessment of the land, the payment of taxes by the person asserting title by adverse possession, and the long acquiescence of parties asserting title, with knowledge or notice of claims or acts of ownership being asserted by other parties, are facts that may, with other circumstances, be considered by the jury."

These instructions are liable to some verbal criticism, but when taken in connection with the instructions given for the plaintiffs, their meaning is sufficiently plain, and they are certainly, exceedingly favorable to the defendant. They recognize to the fullest extent the most liberal views that have ever been expressed by this court, on the subject of adverse possession. The later decisions of this court certainly manifest no disposition to multiply those evidences of adverse possession, which tend to give it a constructive character.

We cannot see that any error has been committed against the defendant in giving and refusing instructions.

The judgment will therefore be affirmed. All the judges concur, except Judge Sherwood, who is absent.

Westpheling v. Enright, Adm'r.

FREDERICK WESTPHELING, Respondent, vs. Michael C. En-RIGHT, ADMINISTRATOR OF THE ESTATE OF T. W. CUNNING-HAM, DECEASED, Appellant.

1. Probate Courts—Appeals from—Failure to prosecute—What constitutes such failure as to warrant affirmance.—Where appellant fails to prosecute his appeal, as required by law, from the judgment of a Probate Court, the judgment should be affirmed. Section 8 of the act concerning appeals from the Probate Court, (Wagn. Stat., 120,) providing for the trial of causes anew in the Circuit Court, is to be construed in connection with § 16 of the law concerning costs. (Wagn. Stat., 344.) But failure, for two terms, to give notice of appeal or to enter an appearance in the Circuit Court, is not such a failure to prosecute the appeal from the Probate Court as the statute contemplates, in order to entitle the appellee to an affirmance. The default which will warrant such a step, is a failure to appear and defend when the case is called for trial.

Appeal from Buchanan Circuit Court.

B. R. Vineyard, for Appellant.

I. There is nothing in the law requiring a notice of the appeal to be given in a case of this sort. It is not like taking an appeal from a justice of the peace where the statute specially requires notice to the other party to be given.

H. M. Ramey, for Respondent.

(Wagn. Stat., 120, § 8, art. 8, is controlled by Wagn. Stat., § 16, p. 344; Martin vs. White, 11 Mo., 214; Starr vs. Stewart, 18 Mo., 410; State vs. Sherman, 19 Mo. 237; Milligan vs. Dunn, 19 Mo., 643.)

NAPTON, Judge, delivered the opinion of the court.

The only question in this case is the propriety of the action of the Circuit Court of Buchanan County, in affirming a judgment rendered in the Probate Court, upon the motion of the plaintiff who was appellee. This motion was as follows: "Now, at this time comes the plaintiff and moves the court to affirm the judgment in this case, and for ground for such motion, says that defendant has not prosecuted his appeal with effect and without delay, and more than two terms of court have passed since the appeal was taken, and appellant has

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given no notice of appeal, and the appellant has not entered his appearance except for the purpose of motion."

There appears to be nothing peculiar in the provisions of the act establishing the Probate Court of Buchanan County, in regard to appeals. The 6th section (p. 85, Sess. Acts of 1866) merely provides that the judgments of that court shall be subject to appeals in all cases to the Circuit Court "in such manner as may be provided by law." The General Statutes provide for the manner of taking appeals from the Probate to the Circuit Court; (Wagn. Stat., 119) and section 8 declares when the transcript from the Probate Court is filed in the Circuit Court, "the court shall be possessed of the cause and shall proceed to hear, try and determine the same anew."

But this court, in the cases of Martin vs. White, (11 Mo., 214;) Starr vs. Stewart, (18 Mo., 410;) State vs. Sherman, (19 Mo., 237.) and Milligan vs. Dunn. (19 Mo., 643) declared that this section must be construed in connexion with the 16th section of the act concerning costs; (Wagn. Stat., 344) which provides that "in all cases where an appeal from a judgment of the County Court or a justice of the peace shall not be prosecuted by the appellant according to law, the judgment shall be affirmed and the costs adjudged accordingly." The court therefore held in those cases, the appellant being in default, that the Circuit Court may properly affirm the judgment, and need not, in such cases, try the case anew. These decisions were chiefly on appeals from justices' courts, but doubtless the reason upon which they rest is equally applicable to Probate Courts, which have supplied the place of County Courts in regard to Probate matters.

But it will be observed, in all these cases, that the appellant was in default, he did not appear when the case was called. In the present case the record does not show any default, unless the facts asserted in the motion, that two terms of court had passed since the transcript was filed, and no notice of the appeal had been given, and no appearance of the appellant had been entered, constitute, either singly or altogether, such a failure to prosecute the appeal as the law requires. But it is

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obvious that the phraseology of the statute concerning the duty of appellant to prosecute without delay, is simply another form of requiring him not to be in default—to answer when the ease is called and be ready to proceed, when the rules of law and of the court require. Many terms of a court may pass without the least negligence or inattention on the part of the appellant, and it is clear that such lapse of time of itself has no tendency to establish the default of the suitor, and there is no provision in the statute requiring notice of an appeal from the Probate Court—though I believe there is in appeals from justices' courts not taken at the trial. The statement in the motion, that the appellant had not entered his appearance, when it is not stated that the case had ever been called, was entirely immaterial.

Although, then, we hold, in accordance with the cases heretofore referred to, that the court has a right to affirm a judgment appealed from, upon the failure of the appellant to prosecute it without delay, notwithstanding the general injunction to try the case anew, yet this failure must be established in accordance with the usual rules that govern the degree of diligence to be observed in legal proceedings.

The record shows no default in this case. The judgment must be reversed and the cause remanded; the other judges concur.

THE HANNIBAL & St. JOSEPH RAILROAD COMPANY, Appellant, vs. James S. Hill, Respondent.

1. Forcible entry and detainer—Conditional purchase of land—Party holding under vendee, liability of—Three years possession, Constr. Stat.—Where one in possession under an inchoate contract for the purchase of land, turns his possession over to a third party, the latter will not be subject to an action of unlawful detainer by the original vendor under § 3 of the Forcible Entry and Detainer Act. (Wagn. Stat., p. 642.) And even where the possession is obtained under demise or lease or by disseizin—as contemplated by that statute—if defendant has been in uninterrupted occupation for three years, he will be protected. (See § 27, Id., p. 646; also Biddle vs. Ramsey, 52 Mo., 153.)

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Appeal from DeKalb Circuit Court.

Carr & Leach, for Appellant.

I. Respondent stood in Wagner's shoes and immediately he was notified of the determination of said contract on the part of appellant, he became a tenant at will; and after the demand was made upon him for the deliverance of possession thereof and after his refusal to quit such possession, he became guilty of an unlawful detainer. (Wagn. Stat., 642, § 3; Ash, Adm'r, vs. Holden, 36 Mo., 163; Venable vs. McDonald, 4 Dana, 337; Dew vs. Webster, 10 Yerger, 513; 5 Yerger, 398; 2 Marsh, 242; 3 Pet., 43; 12 Pet., 264.)

II. The respondent does not come within the spirit and intent of § 27, p. 646, Wagn. Stat., which protects him after three years possession, etc. He was not guilty of an unlawful detainer until after a demand was made in writing for the deliverance of said possession of said land, and his refusal to quit such possession. (Grant vs. White, 42 Mo., 285.)

William Henry, for Respondent.

I. Respondent had been in possession more than three years, hence, neither forcible entry and detainer nor unlawful detainer can be maintained. (Wagn. Stat., 646, § 27.)

II. Appellant cannot maintain this action under the first clause of § 3, for the terms "demise or let," etc., are apt terms to describe a leasehold estate, and, in the connection in which they are used in this clause, clearly show that it has no application to any person but a tenant or sub-tenant. Nor can he maintain the action under the second clause of this section, because the statement fails to show that the respondent was a disseizor.

III. Under the statute we are now considering, this court has defined the term "disseizin" to mean "any entry which is wrongful and without force, upon the actual possession of another." (Spalding vs. Mayhall, 27 Mo., 377; see, also, 3 Blackst. Comm.; Wunsch vs. Gretel, 26 Mo., 580.)

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Sherwood, Judge, delivered the opinion of the court.

In 1867, the plaintiff sold to one A. B. Wagner, a tract of land in DeKalb county, for a certain consideration, which was to be paid in ten annual instalments, as shown by the instrument which evidenced the contract. By the terms of this instrument, time was made the essence of the contract, and provision was made therein, that if Wagner failed to punctually pay the annual sums specified, and each of them, he was, immediately upon such failure, to surrender possession, and the contract and all benefit arising therefrom, to the vendee, were thenceforth to cease and determine, and all legal and equitable rights which he had thereby acquired, were thereupon, without re-entry or declaration of forfeiture, to revert to. and be reinvested in, the vendor, etc., etc. Wagner, under this contract, entered into possession of the purchased premises, remained a year, and made but one payment, when he left, after having placed in possession thereof the defendant, who ever since has continued to hold the land in controversy. When the sixth annual payment became due and remained unpaid, as well as the second, third, fourth and fifth yearly payments, the plaintiff served a notice to quit on defendant, and upon his failure to do so, instituted, before a justice of the peace, the present action of unlawful detainer.

The defendant appealed from the judgment of the justice, and, in the Circuit Court, successfully moved the dismissal of the suit, on the ground that the complaint showed that defendant had been in the quiet possession of the land sued for, and had the uninterrupted occupation of the same, for the space of three whole years together, immediately preceding the filing of the complaint.

This motion of the defendant embodies the first clause of § 72, art. 11 of the Forcible Entry and Detainer Act (Wagn. Stat., 646), and there was no error in the ruling which held that plaintiff, under the circumstances as detailed in the complaint, was not entitled to maintain the action. Section 3 of the above mentioned article has no reference whatever to a case of this character, but only applies to two classes of cases.

First, where a person wilfully and without force, holds over any lands after the termination of the time for which they were *demised* or *let* to him, etc.; or, Second, when any person wrongfully and without force, by disseizin, shall obtain and continue in possession of any lands, after demand made in writing, etc., shall refuse to quit possession, etc.

Here the premises were never let or demised to Wagner nor to defendant, nor was the possession obtained by either of

them, wrongfully and without force by disseizin.

But even had possession of the premises been obtained in either of the above specified modes, still the uninterrupted occupation of the land sued for, by the defendant for three whole years together, next preceding the filing of the complaint would be a complete bar to plaintiff's action. (Biddle vs. Ramsey, 52 Mo., 153.)

The cases of Grant vs. White (42 Mo., 285), and of Gillete vs. Mathews (45 Mo., 307), relied on by plaintiff as being in point do not bear the remotest resemblance to the case at bar; as each of those cases evidently proceed upon the theory that there had been no such period, nor character of possession as is evidently contemplated by § 27, above referred to.

Judgment affirmed; all the judges concur.

ALICE FOLGER, Respondent, vs. CHARLES HEIDEL, Appellant.

- Enidence—Verbal directions of Probate Judge.—The verbal directions of a judge of Probate will not protect a guardian and are not receivable in evidence in defense of his action.
- 2. Ward, gratuitous maintenance of—Subsequent claim for—Payment of by guardian—Estate not liable, when.—The question whether an allowance out of his estate shall be granted for the support of a ward, depends very much on the facts of the particular case. It may, in some instances, be granted for past maintenance; but never, where one has taken and brought up an infant as a member of his family, without any apparent claim or expectation, until afterward, of an allowance from the estate for such support. And a guardian paying such charge cannot hold the estate therefor.
- 3. Administrator—Annual settlement of not conclusive.—An annual settlement is not conclusive, nor has it the force of a judgment.

Appeal from Carroll Circuit Court.

Hale & Eads, for Appellant, cited, in argument, Brent by Guardian vs. Grace, Adm'r, 30 Mo., 253; Mitchell vs. Williams, 27 Mo., 399; Wagn. Stat., 1872, § 28, Ch., 66; Strouse vs. Drennan, 41 Mo., 289.

L. H. Waters, with J. H. Wright, for Respondent.

I. While a guardian may make expenditures for the support and maintenance of his ward, without applying in the first instance to the Probate Court for an order and appropriation, he must show that the expenditure was subsequently sanctioned by the court and allowed him in his settlement. (Brent by Guardian vs. Grace, Adm'r, 30 Mo., 253.) And there must be some record showing that the payment was made under such order or sanction. (Dillon's, Adm'r vs. Bates, etc., 39 Mo., 302.)

II. The payment if made at all by the appellant was for past maintenance, covering a period commencing fourteen years before the pretended payment was made, and made to parties who stood in loco parentis towards respondent, and nothing short of an express order to pay the same, made by a court of competent jurisdiction, should be accepted as a justification of the expenditure. (Otte et ux. v. Becton, 55 Mo., 99; 2 Sto. Eq., § 1354 a., 10 Ed. and note.)

WAGNER, Judge, delivered the opinion of the court.

The first and main exception in this cause relates to the action of the court in rejecting the claim of the defendant for six hundred dollars, which he alleged that he paid for the clothing, support, education and medical attention of plaintiff, who was his ward.

It seems that plaintiff was left an orphan when she was a small infant and the defendant was her testamentary guardian and curator. She always resided with her grandfather and grandmother who treated her as one of the family.

Defendant filed with his settlement, in 1872, a receipt purporting to be signed by the grand parents, G. W. and Nancy

Folger which states that the money was for the clothing, support, education and medical attention of Alice, the plaintiff, at the rate of fifty dollars a year; and defendant, in his testimony says that it was for the first twelve years of her life; that Mrs. Folger, who appears to have transacted all the business, caused the receipt to be signed in his presence and ordered him to pay the money to C. W. Heidel; that he did so and took a note payable to the Folgers for the amount.

On the other hand, the execution of the receipt was pointedly denied. Mrs. Shirley, who it was alleged signed the receipt for and at the request of Mrs. Folger, positively denies that she signed the paper produced, and C. W. Heidel, who got the money, says that he went to the defendant to borrow the money, and he told him that he could let him have six hundred dollars of plaintiff's money, and that when he received it defendant told him to draw up a note, payable to Mrs. Folger, and that he drew up the same and gave it to defendant; that he never had any arrangements with Mrs. Folger in regard to borrowing the money; that he borrowed it of the defendant and not of Mrs. Folger.

There was some testimony to show that Mrs. Folger, on one occasion, asked defendant if she could not get something for keeping Alice, and defendant offered to show that he had asked the judge of the Probate Court for an order in relation to the payment of the \$600, and asked him if he should pay it, and, if so, whether he would be allowed for it in his settlements. This evidence was objected to, because, 1st. it did not purport to be a claim for necessaries; 2nd, the Probate Court was a court of record, and could only speak by the record, and, 3rd, the oral directions of the judge were not evidence for any purpose. The objections were sustained and the testimony excluded.

Defendant then offered to prove by the probate judge, that he, the judge, told defendant to pay the claim and take the receipt for it, and this evidence was ruled out.

It is not pretended that any of these conversations or directions took place in term time. Whatever is done by a court

of record, must appear by the record, and the mere verbal directions or declarations of a judge are not receivable in evidence.

We will not attempt here to analyze the evidence in regard to the receipt. It was directly conflicting—wholly irreconcilable, and the court below, who heard the witnesses, was much more competent to judge of their credibility than we possibly could be. But it seems that the judgment of the court was not founded so much upon the weight of evidence, as upon the conclusion of law that defendant's claim could not be allowed.

It is evident that the receipt was wrongly dated; that fact is now admitted. It bears date in 1868, and if it was given at all, it was executed in 1870. It was intended to cover the period up to 1868, and that would include the first twelve years of plaintiff's existence. It will thus be perceived, that it was for maintenance and support for a time that was entirely past. Now it is very clear that the grandparents never intended to charge the plaintiff anything for living with them She was treated and regarded as one of the family. Upon this point the evidence is conclusive. If after she had lived with them as one of the family, without any intention of charging her for the same, they had changed their minds, it would make no difference; for the principle is a familiar one, that what was originally intended as a gratuity, cannot subsequently be turned into a charge. (Allen vs. Richmond College. 41 Mo., 309.)

In the case of Whipple vs. Dow et ux. (2 Mass., 418), it was said: "If a mother support her child gratuitously, without any intention, at the time, of demanding a recompense, nothing is more clear than that she could not, upon a change of inclination, afterwards have an action therefor."

When and under what circumstances an allowance will be made for the support or maintenance of the ward depends very much on the facts of each particular case, and it is not denied that in certain cases it may be made as well for past as future maintenance. (Guion vs. Guion, 16 Mo., 48; Gil-

lete vs. Camp. 27 Mo., 541; Otte vs. Becton, 55 Mo., 99.) But it is not believed that a case can be found where a parent or any one standing in loco parentis has been allowed to charge an infant when he took it and raised it as a member of his family, without any intention or design of charging for its support.

The case of Brent vs. Grace's Adm'r (30 Mo., 253), is cited to show that the defendant is entitled to the allowance, though no previous authority was obtained by him from the court for its payment. That case decides that if the guardian makes expenditures for the maintenance and education of his ward, without first procuring an appropriation from the Probate Court, the allowance of an account for such expenditures already made satisfies the statute; but that case is widely different from this and clearly distinguishable from it. There the guardian paid the expenditures as they occurred, for which there was an undoubted liability; here he attempts to go back and pay for past maintenance, for which there was no legal liability, and on which no recovery could have been had in an action at law.

But it is contended, that the claim was allowed in his settlement, in 1872, and that that is conclusive and decisive in his favor. The settlement made in 1872, was an annual settlement, and the record does not show that it was ever acted upon or approved. But waiving this last defect or omission in the record, it is the settled law in this State, that an annual settlement is not conclusive, nor has it the force of a judgment. This question was very thoroughly discussed in the case of Picot vs. O'Fallon (35 Mo., 29), and that case has been followed and approved in all our subsequent decisions.

Under the statute (Wagn. Stat., 681, § 48), the guardian is required to give notice when he makes his final settlement, but no such notice, nor any notice whatever, is required in reference to annual settlements, and such settlements are therefore ex parte, and are rarely, if ever, made in the presence of the parties interested in the estate. They are in no manner in the nature of judgments, for no appeal can be taken from

them. On a final settlement, all the parties in interest are brought in to protect their rights, and being in on notice, they are effectually concluded by the settlement made. They are then at liberty to examine into the whole matter of the guardianship, and show that errors and mistakes have been committed; that the guardian has received credits which he was not entitled to, and that he has neglected to charge himself with effects which have come into his hands. And, as the proceeding is final, an appeal lies from the judgment.

It is a question of great doubt, in this case, whether the defendant really parted with the money for the purpose of paying the supposed claim of Mr. & Mrs. Folger, or whether he loaned it to C. W. Heidel and took the note in order to make himself secure. At all events, his ward was not liable for the claim; and as he took no precautions to protect her rights and his acts were acts purely voluntary, he must be regarded as

having paid it in his own wrong.

The further point is urged, here, that the court had no right at the time to require the guardian to make a final settlement and pay the money in his hands to the plaintiff. By the provisions of the will under which the defendant qualified and acted as guardian and curator, the estate of the testator was not to be paid over to the plaintiff till she arrived at the age of twenty-one years. At the time the court compelled him to make his final settlement in this case she was in her nineteenth year. But the estate in controversy did not descend to the plaintiff under the provisions of the will, and was never the property of the testator. She inherited it from an entirely different source, and the guardian did not receive it under the will. By .our statute, women are now of age at eighteen years (Wagn. Stat., 672, § 1), and as plaintiff had arrived at that age, she was entitled to her estate, which was not derived from the will.

The judgment, in my opinion, should be affirmed; all the judges concurring.

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Schuster v. Kas. City, St. Jo. & Council Bluffs R. R. Co.

AUGUST SCHUSTER. Defendant in Error, vs. The Kansas City, St. Joseph & Council Bluffs Railroad Company, Plaintiff in Error.

1. Practice, Supreme Court-Conflict of evidence. - In civil actions at law Su-

preme Court will not consider questions of conflicting evidence.

2. Railroad—Deductions from pay rolls of workmen of amounts due merchant for supplies—Implied assumpsit.—A railroad company having become liable to pay the wages of workmen employed by contractors (Wagn. Stat., 302, § 10) deducted, on their pay rolls, charges for sundry goods theretofore furnished the men by a merchant under an agreement entered into by him with the contractors. On the rolls, and pursuant to the agreement, the amounts purchased were entered as payments made on the wages account and as due from the contractors to the merchant; Held, that, being a stranger to the agreement, the company was not liable to the merchant under it for such advances; and its deductions of the amounts due the merchant from the wages of the meu would not, of itself, raise an assumpsit in his favor against it. And it would be liable, notwithstanding, to the employees for the unpaid balances. But they having acquiesced in that mode of settlement, the merchant could recover those sums from the company on an implied undertaking to pay the same.

3. Assumpsit-Promise made for third party.-A promise made for his benefit

may be sued upon by a third person.

Error to Andrew Circuit Court.

Mossman & Hall, for Plaintiff in Error.

A. J. Harlan, with W. S. Greenlee, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

This was an action commenced by the plaintiff against the defendant, wherein the amount claimed to be due was the sum of thirteen hundred dollars.

From the record it appears that plaintiff was a merchant, and that Parker & Wills, who were contractors to do certain work for the defendant, made an arrangement with him, by which he was to let their laborers have goods on their orders. He did let the laborers have goods to the amount claimed in the petition. Subsequently, Parker & Wills failed to pay their laborers; and they gave notice in accordance with the statute, whereby defendant became liable to them for thirty days' wages.

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Under the evidence and ruling of the court a verdict was found for plaintiff, for one hundred and eighty-four dollars and thirty-five cents.

The arrangement entered into by the plaintiff with Parker and Wills, by which plaintiff paid that firm's laborers by orders out of his store, devolved no responsibility on the defendant to see that plaintiff was paid. It was a contract between those parties, to which defendant was an entire stranger and for the goods furnished according to its terms, it could not be made liable; and so the jury must have found, when the greater portion of plaintiff's claim was rejected. But under the notice given to the defendant, the company was liable to the laborers for thirty days' wages, and there was evidence submitted going to show that when the company paid the hands under this liability, the payment was made on pay rolls which had been kept by the foreman, and that those rolls showed certain amounts on some of the claims which had been paid by plaintiff; that these amounts which had been paid by plaintiff were deducted by the paymaster as so much received by the parties, which was due and payable to plaintiff and that the settlement was adjusted on this basis. It was for these sums so deducted by the defendant's paymaster, that the jury found their verdict.

There was some contradictory evidence, it is true, introduced by the defendant, but with that we have nothing to do. The jury passed upon it and that concludes us.

The simple fact that defendant, in paying the hands, deducted from their accounts what was due to the plaintiff would not, of itself, raise an assumpsit in his behalf. If the laborers or hands had refused to accede to the arrangement, they would not have been prevented from maintaining their action against the defendant for the balance withheld for plaintiff's benefit. But it appears, plainly enough, that the parties to whom the debts were owing acquiesced in and agreed to the manner in which they were paid off. The parties whose claims were thus paid were the witnesses by whom plaintiff mainly proved the facts. Under these circumstances there

was an implied undertaking, that defendant would pay the respective amounts deducted to the plaintiff; and it has been frequently held in this court, that a promise made for the benefit of a third person, may be sued upon by such person.

The judgment should be affirmed; the other judges concurring, except Judge Sherwood, who is absent.

John Neenan, Respondent, vs. Frederick W. Smith, Appellant.

- St. Joseph, charter of—Special taxes—Liability of owner prima facie—As
 sessment apportioned to frontage—Charges for work not in contract—Interest;
 tender of, etc.—In suit on a special tax bill for street improvements, brought
 under the amended charter of St. Joseph, (Sess. Acts, 1865, p. 433, et seg.)
 held:
- 1st. The bill made the owner prima facie liable for the amount of the debt charged and constituted a valid claim until rebutted.
- 2nd. The amount assessed must be in that proportion to the whole charge under the contract which the frontage of the lot taxed bears to that of the whole work undertaken.
- 3rd. The fact that some small amount of work or material may have been apportioned and charged in the bill other than that called for by the contract, will not necessarily invalidate the bill; but the additional amount so assessed may, on proper showing, be deducted.
- 4th. In case the bill contains such excessive charges, accruing interest can be stopped only by tendering the true amount; then in event of non-acceptance thereof, if the holder fail to recover more, he can have no interest.
- 5th. The failure of the city engineer to record the bill in a book kept for that purpose, will not defeat the bill.
- 2. Street improvement—Contract embracing independent streets—Non-paving of a part of the streets—Tax bills for work on finished streets—Recovery on.—Where a contract for street paving embraces a number of disconnected streets, the fact that the paving on some of them is unfinished will not prevent recovery on special tax bills for work on other streets where the work has been completed. And if the paving called for by the contract, has been completed on the particular street, that is sufficient, regardless of the question whether the remainder of the street is paved, or not.

Appeal from Buchanan Circuit Court.

Ben. Loan, for Appellant.

I. The tax bill which will authorize a recovery must be for work specified in the contract and no other. If work not so included was done on Felix, Francis or Ninth Streets, and the cost thereof was added to the work specified in the contract, and the whole amount apportioned to the property fronting on the work specified in the contract to be done, then such apportionment was unauthorized and is void. (St. Louis v. Clemens, 49 Mo. 552.)

II. The court erred in giving the 1st instruction as asked by the plaintiff. Tax bills are not *prima facie* evidence of the validity of the claim. (Hægele vs. Malinckrodt, 46 Mo., 577.)

III. The whole contract must be completed before any tax bills can be lawfully issued. (St. Louis, &c., vs. Clemens, 49 Mo., 553; Kiley vs. Cranor, 51 Mo., 541.)

Vineyard & Vories, for Respondent.

I. The legislature intended to make the bills not only prima facie evidence that the work and materials were furnished as charged, but also that the person therein named as owner of the property was "liable" as therein charged. (City of St. Louis to use, &c., vs. Hardy, 35 Mo., 261; City of St. Louis to use, &c., vs. Coons, 37 Mo., 48; City of St. Louis to use, &c., vs. Armstrong, 38 Mo., 33: Neenan vs. Smith, 50 Mo., 525.)

II. Plaintiff's instructions properly confined the jury in their finding to work done on Frederick Avenue. (Neenan vs. Smith, supra.)

III. The first instruction refused defendant is not the law. It would have made the jury find for the defendant, if there had been a single item of ten cents charged in the bill not covered by the contract.

WAGNER, Judge, delivered the opinion of the court.

We see no error in the instructions given for the plaintiff. The amended city charter of St. Joseph provides that when-

ever the mayor and city council shall order the paving, macadamizing, guttering, cross-walks, side-walks or curbing of the carriage ways, intersections and side-walks of any street, lane, alley or avenue within the limits of said city, the cost of the same shall be paid by the owners of the property in the vicinity. (Acts 1865, p. 435, § 4.)

The fifth section of the act provides that whenever the work shall have been fully completed under the authority of an ordinance, the city engineer or other officer having charge of the work, shall compute the cost thereof and assess it as a special tax against the adjoining property fronting upon the work done, and each lot of ground shall be charged in proportion to the frontage thereof, with the cost of construction, The officer is then authorized to make out a certified bill of such assessment against each lot of ground chargeable with the work done in the name of the owner thereof, and he is required to keep a record of such bill or account in a properly bound book in his office, which book is subject to the inspection of any citizen. Every such certified bill, when an action is brought to recover the amount thereof, is made prima facie evidence that the work and materials charged in such bill have been furnished, and of the liability of the person therein named as the owner of the property. Under this provision the owner of the property is liable for the amount of the indebtedness as charged in the bills. The bills make a prima facie case of the facts and liabilities stated in them, and present a valid claim till rebutted by countervailing evidence.

The finding was limited to that part of the work done on Frederick Avenue, between Eighth and Ninth Streets, which was the part of the avenue covered by the plaintiff's contract, and that was in accordance with the decision of this court when this case was here before. (Neenan vs. Smith, 50 Mo., 525.)

The court properly enough refused defendant's first instruction, because it made the tax bills entirely void if any other work or materials were apportioned or assumed in the bills

than what was included in the contract. This would have invalidated the bills and deprived the contractor, who had honestly done his work, of all redress, if the engineer had made a trifling mistake in the matter of the computation or assessment. A proposition which would lead to such a result would be manifestly unjust, and cannot be law.

Defendant's own instructions required the jury to reduce the assessments if they found from the evidence that the work done and materials furnished were not in accordance with the ordinance providing for the manner of doing the work, and they also required a reduction if there was an over assessment. They were in conformity to sound principles, and only allowed for the real value of the work and materials; and would also have allowed for any damages the defendant might have sustained in consequence of plaintiff failing to comply with his contract.

There is nothing in the position assumed in reference to the engineer fraudulently accepting the work. He had nothing to do with its acceptance. It was his duty to make out the assessments; but the acceptance devolved on the board of public works. In addition to this, there was no evidence to show any fraudulent acts or practices on the part of the engineer.

It is insisted that if the plaintiff claimed a greater amount from the defendant than was actually or justly due, then no interest should have been allowed at all on what was really due, and an instruction to this effect was asked and refused. The only way to have stopped the accruing interest would have been for the defendant to have tendered the amount justly due, and then, in the event of a refusal, had plaintiff failed to recover a greater sum, he could have obtained no interest.

The point raised that the bills were invalid unless recorded by the engineer in a book kept for that purpose, is not maintainable. The contractor had no power or control over the engineer, and if that officer failed to do his duty an innocent party who had performed labor and purchased materials could

not be injured thereby. The engineer testifies that he did make the record in a book; but whether he did or not is entirely immaterial. It was his duty, not that of the plaintiff, and the latter had no means of requiring him to perform it, and was not obliged to see that it was performed.

There was evidence to show that the engineer made the assessment and computed the cost of the work done, in accordance with the charter, and the requirements of the city ordinances, and that the assessment of each lot was in the proportion that its front bore to the front of all the lots on the work under contract. This mode of assessment was correct, and the question was fairly submitted.

It is complained of as error that the court refused defendant's 16th instruction, which declared that unless the work specified in the contract was performed and completed before the commencement of this suit, the jury should find for the defendant.

The contract embraced work on some four or five other streets in different parts of the city. With the work on those other streets defendant was not interested, so far as this contract was concerned. All that was necessary to make him liable was to show that the work was completed on the street out of which the assessment grew. Then he had received the benefits which authorized the assessment, and on which his responsibility rested. Whether another street was ever macadamized or not, would make no difference with him, as it would not affect his interest in any way in respect to the street on which the work was performed, and out of which his benefits were derived.

It was under the idea that all the work included in the contract, without regard to the street, should be done, I suppose, that induced the defendant to offer his seventeenth instruction, which was that there was no evidence before the jury that the work had been performed before the commencement of the suits. This instruction was rightfully refused; for the plaintiff on the trial swore directly that the bills sued on were made out after all the work on Frederick Avenue was finished, and that was sufficient.

Cahn v. Dutton.

The objections urged by the defendant in this court are mainly technical in their character, and have little or no merit in them.

The judgment should be affirmed; all the judges concur, except judge Vories, who did not sit.

Joseph Cahn, Respondent, vs. Edward Dutton, Appellant.

1. Bills and notes—Signature on back of note, when that of maker.—Where one writes his name on the back of a note whereof he is not shown by the instrument to be either an original party or indorsee, he will be presumed, in the absence of extrinsic testimony, to be a joint maker; but such presumption may be removed by parol evidence. And what weight is to be given to such evidence is a question for the jury to determine.

Appeal from Buchanan Circuit Court.

B. R. Vineyard, for Appellant.

Although prima facie the man who signs his name on the back of the note, not being the payee, is a maker, still he may, by parol, show that he did not sign as maker, but simply as endorser. (Seymour vs. Farrell, 51 Mo., 95; Kuntz vs. Temple, 48 Mo., 71; Mammon vs. Hartman, 51 Mo., 168; Ayres vs. Milroy, 53 Mo., 516.) And on this point the evidence was all in favor of appellant, and the finding of the court was without any vindication whatever in the testimony.

H. M. Ramey, for Respondent.

I. It is well settled law in this State, that a party who writes his name on the back of a promissory note, of which he is neither payee nor indorser, is to be treated as a maker of the note. (18 Mo., 74; 30 Mo., 226.)

The trial court sitting as a jury passed upon this testimony, and this court will not review the evidence or disturb the ver dict.

Cahn v. Dutton.

WAGNER, Judge, delivered the opinion of the court.

This was an action on a negotiable promissory note payable to the plaintiff, and signed by Donelan and Brown on the face, and on the back by Dutton, the defendant.

Donelan and Brown made no defence, and the defendant filed an answer, in which he stated that he never signed the note as a maker, but admitted that he signed it as an endorser, and he averred that plaintiff knew at the time he received the note that defendant was only endorser thereon.

To this answer there was a replication denying the averment of knowledge on the part of the plaintiff, that defendant signed the note only as endorser, and alleging that he signed the note with the other defendants as a joint maker.

This cause was tried before the court sitting as a jury, who, after hearing all the evidence offered by both sides, gave judgment for the plaintiff against all the defendants, and

Dutton appealed.

Plaintiff asked for no instruction, and the defendant submitted one which was given, which stated the law to be,—
"If the court believe from the evidence that the defendant,
Dutton, signed his name on the back of said note as an indorser, and not as a maker, and such was the understanding
of the parties to said note at the time, then the court will find
for the defendant, Dutton, under the pleadings in this case."

The court admitted all defendant's evidence, and gave the only declaration of law that he asked, and then found against him on the facts.

The counsel for the defendant contends that the verdict was not merely against the weight of evidence, but that there was no evidence whatever to support it. This assumption is not maintainable. Dutton testified in his own behalf that he signed the note at the request of Donelan, for his, Donelan's and Brown's accommodation, and that he refused to sign it as a maker, but signed it only as an indorser. But on his cross-examination he stated that he signed the note at his shop, and that he never told the plaintiff that he signed the same

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as an indorser or otherwise. He also said that the note was given as a renewal of a note signed by Smith and Brown, and indorsed by Donelan and himself.

The plaintiff then introduced Mr. Williams, who stated that he acted for plaintiff in getting the note, sued on; that he got Donelan to take it to defendant Dutton to sign, and that it was given in renewal of another note on which Dutton was indorser. On his cross-examination, he said he was cashier of the bank, and was acting for plaintiff in loaning money. Dutton was indorser on the first note, and he regarded him as indorser on the note sued on. Donelan's testimony mainly corroborated Dutton's, as to the manner of his signing the note.

The defendant's name on the back of the note prima facie imported that he was a maker. The onus devolved on him to show that he signed as an endorser. In what capacity he did sign it was a question of fact, to be passed upon by the triers thereof. Defendant himself admits that he did not inform the plaintiff that he signed the note as indorser, and the testimony of Williams, who was acting as agent of the plaintiff, might have well been construed by the court as amounting to a mere inference or opinion. Unless he had knowledge the plaintiff had none.

In the conflict the court below was the proper tribunal to determine the effect to be given to the evidence, and as no point is raised by any instruction as to its legal character, there is nothing for this court to review.

The judgment must be affirmed; the other judges concur.

Doss v. Davis.

CAROLINE T. Doss, Plaintiff in Error, vs. Thomas W. Davis and James M. Arnold, Defendants in Error.

1. Bill in equity to re-docket case on the ground of fraudulent defense and removal of cause from docket.—Where it appears that through the fraud and combination of the attorneys, a false and sham defense to plaintiff's suit is interposed, and the court is so practiced upon and deceived that no judgment is obtained, and, without any order or action of the court, the case is suffered to disappear from the docket, plaintiff will be entitled, on a proper case presented, to have the cause re-docketed and a trial instituted on the pleadings as they remain on the files of the court.

Error to Buchanan Circuit Court.

Murat Masterson, for Plaintiff in Error.

I. Courts of equity have original, independent and inherent jurisdiction in cases like the one at bar. (Sto. Eq. Jur., 252, and cases cited, Id., 256; Kerr on Fraud & Mist., 43, 44, and cases cited, 252, 293-4; Reigal vs. Wood, 1 Johns. Ch., 401; Barnesly vs. Powell, 1 Ves., 120, 284, 289; Phalen vs. Clark, 19 Conn., 421; White vs. Hall, 12 Ves., 324; Wilson vs. Watt, 9 Md., 359; 2 Smith, L. C., 687; Browwood vs. Edward, 2 Ves., 246; Bridgeman vs. Green, Id., 627; Hugeniere vs. Rasely, 14 Ves., 289; Phelps vs. Peabody, 7 Cal., 52; Robb vs. Robb, 6 Cal., 22; Luttrel vs. Lord Waltham, 4 Ves., 290; S. C. 11 Ves., 638; Goss vs. Tracey, 1 Wil., 288; Thynn vs. Thynn, 1 Vern., 296; Chamberlain vs. Agar, 2 Ves. & B., 259.) And plaintiff is entitled to have her case re-docketed, and set down on hearing. Defendants ought not to have the advantage they claim under the judgment.

Hall & Merryman, for Defendants in Error.

I. The petition does not state any cause of action. Plaintiff can sue Davis at any time on the note described in her petition. The dismissal of the suit as to Davis, as stated in the petition, is no bar to another suit.

II. The statute of limitations must be pleaded in actions at law; and, if pleaded to the new action which plaintiff may bring on said note, she could reply the facts set up in the petition in this case; and if they constitute a good reply, full effect would be given to them. (19 Mo., 64, 65.)

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III. If this suit can be maintained, a similar suit could be maintained in all cases of non-suit upon the allegations of fraud in obtaining said non-suit. This would be a novel practice.

WAGNER, Judge, delivered the opinion of the court.

This was a petition in the nature of a bill in equity. In substance it charges that in 1861, the plaintiff placed in the hands of Ebenezer N. O. Clough, an attorney at law, a promissory note against Davis and Arnold for collection; that Clough instituted suit thereon, in the Platte County Circuit Court, and that personal service was had on both of the defendants; that Arnold was entirely insolvent at the time and has remained so ever since, and that Davis was then and is now solvent and possessed of a large amount of real and personal property; that Arnold made no appearance, and judgment was rendered against him by default.

The petition then alleges that plaintiff's attorney, Ebenezer N. O. Clough and defendants' attorney, W. McN. Clough, were brothers, and that they and the defendant Davis entered into a conspiracy and combination to defraud and cheat plaintiff, and in execution of this design it was agreed that defendant, Davis, should put in his separate answer, denying the alegations in the petition, and that the trial, as to him, should be a sham; that the answer was false in every particular, and known so to be by her attorney and Davis who filed it; that by the conspiracy entered into between the parties, the court was imposed upon in rendering its orders and judgment, and the plaintiff was defrauded out of her rights, and prevented from getting a judgment against Davis, who was the only solvent party defendant; that after the judgment was taken against Arnold, nothing further was done with the case, but it was permitted to be dropped from the docket; that plaintiff was a resident of the State of Kentucky, and that she was kept in ignorance of the true state of the case by the false and fraudulent representations of her attorney; that immediately after becoming possessed of the facts, she took steps as

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soon as she conveniently could, to set aside the fraudulent proceedings.

The prayer was that the judgment against Arnold might be set aside, and the cause re-docketed, and a trial had against Davis on the merits:

To this petition Davis filed his answer, and the plaintiff replied.

In the court below, the defendant, Davis, moved for judgment in his favor on the pleadings, because the petition stated that in the year 1864, the case was tried in the Platte County Circuit Court, and that the court found for plaintiff as against Arnold, and rendered judgment against him; that the plaintiff in this suit, upon a petition in the nature of a bill of review, asked for a new trial as to the defendant, Davis, when no judgment had ever been rendered against him; he therefore asked the court to dismiss the plaintiff's petition because there was no judgment to review.

The court sustained this motion, and the plaintiff prosecuted her writ of error.

The motion of the defendant was based on a wrong theory—a mistaken assumption of facts. The petition is not in the nature of a bill of review, nor does it seek to review any judgment rendered against Davis, the defendant. It proceeds directly upon the opposite view, that through the alleged fraud, connivance and conspiracy of the parties, no judgment at all was rendered.

As to the prayer, that the judgment against Arnold be set aside, that may be disregarded, so far as Davis is concerned. The judgment was properly taken against him, as he made no defense, but it was improperly made final, in consequence of the fraud of Davis and the attorneys. It may be set aside and the trial continued as if it had never been taken.

Courts of equity have full power to relieve against fraudulent acts which have prevented those things from being done which would have legally and justly been done, but for the false and fraudulent statements which induced the prevention.

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Where there has been a fraudulent prevention or suppression, the court will take from the party himself, the benefit which he may have derived from his own fraud, imposition or undue influence, and restore the injured party to the position he was in, if possible, when he was displaced by the fraud. (1 Sto. Eq. Jur., § 256.)

In the present case there was no adjudication against the defendant. It is charged that a false answer was put in, that the court was imposed on and deceived, and without any order, action or judgment, the case in some mysterious manner disappeared from the docket. If the plaintiff should prove her allegations, and it should be made to appear that this result was produced by the fraud, combination and conspiracy of Davis and the attorneys, she would be entitled to have the case re-docketed, and to have a trial on the pleadings as they remained on the files of the court.

The judgment will, therefore, be reversed and the cause remanded. The other judges concur.

John Hosher Respondent, vs. Kansas City, St. Joseph & Council Bluffs Railroad Company, Appellant.

1. Eminent Domain—Benefits deducted from assessment of damages for land taken for railroads—Rule as to—Testimony touching.—In the assessment of damages for land taken for railroad purposes the benefit which is to be deducted from the damages which the owner sustains is the direct and peculiar benefit resulting to the land in particular, and not the general benefit accruing to it in common with other land which is enhanced in value by the building of the road. (St. Louis & St. Jo. R. R. Co. vs. Richardson, 45 Mo., 466.) And the land should be assessed at its value when taken. But witnesses may testify as to its value before and after the taking, as tending to shed light on that point.

Appeal from Nodaway Circuit Court.

Willard P. Hall, for Appellant.

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William Heren, for Respondent, cited St. Louis & St. Joseph R. R. Co. vs. Richardson, (45 Mo., 466;) Newby vs. Platte Co., (25 Mo., 258;) Pac. R. R. Co. vs. Chrystal (35 Mo., 544).

WAGNER, Judge, delivered the opinion of the court.

No error is perceived in the record which would justify a reversal in this cause and it must be affirmed.

The action was for damages which the plaintiff sustained in consequence of the company appropriating a quantity of his land in the construction and building of its road. All the instructions asked for on both sides were given, and they stated the law in accordance with the repeated rule that has been announced by this court, namely, that in the assessment of damages for property taken for railroad purposes, the benefit which is to be deducted from the damages the owner sustains, is the direct and peculiar benefit resulting to the land in particular, and not the general benefit accruing to it in common with other land which is enhanced in value by the building of the road. The instructions of the defendant confined the assessment to the value at the time the land was taken, and that was entirely proper.

The objection that the testimony given by the witnesses for the plaintiff was not admissible because it stated their opinions, is not maintainable. The evidence was not simply an opinion as to the damages sustained by reason of the appropriation. It was founded on facts. The witnesses stated the value of the land before the same was taken and the road constructed, and the value afterwards, and the jury were permitted to draw their conclusions thereon. We see nothing wrong about this. No error appearing, the judgment will be affirmed; the other

jugdes concur.

WILLIAM SHIRTS, Plaintiff in Error, vs. HENRY OVERJOHN, Defendant in Error.

1. Bills and notes—Maker's signature procured by fraud—Negligence of maker—Rights of bona fide holders.—Where it appears that the party sought to be charged intended to bind himself by some obligation in writing, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining for himself the true character of such instrument before signing it, but neglecting to avail himself of such means of information, and relying on the representations of another as to the contents of the instrument, signed and delivered a negotiable promissory note, instead of the instrument he intended to sign, he cannot be heard to impeach its validity in the hands of a bona fide holder.

2. Bills and notes—Presumption—Admission.—It will be presumed, in the absence of proof to the contrary, that the holder of negotiable paper received it for value, before maturity, and in the regular course of business; but, in the absence of admissions in the pleadings or in the testimony of the defendant, it is error to instruct the jury that such presumptions are admitted facts.

8. Bills and notes—Cases in judgment.—O., supposing he was signing a receipt for plows, to be left with him on sale, signed and delivered a negotiable promissory note. The plows were never delivered. Learning afterwards the true character of the instrument, and that the payee was endeavoring to negotiate it, O. caused a notice to be published, warning the public against purchasing the note. Thereupon, E., the payee, complained to O. that he was doing him an injustice, saying that he had sold two of the plows and would endorse a credit of fifty dollars on the note. To this proposition O. assented, and the endorsement was made and O. signed the memorandum. Held, (1.) That as a matter of law, the circumstances under which the note was signed constituted no defense to an action on it by a bona fide holder; and (2.) that the act of O. in assenting to and signing the endorsement on the note, after acquiring full notice of its true character, amounted to a ratification of the instrument.

Error to Linn Circuit Court.

H. Lithgow, for Plaintiff in Error.

I. After defendant had advertised the note in a newspaper, he placed his name on the back of the note, thereby ratifying his own act; and the endorsement or acceptance of a note or bill is an admission of the truth of all the facts which are recited in it. (1 Greenl. Ev., § 196; 1 Phill. Ev., 364 and n. 1.) Defendant was guilty of gross negligence and is estopped from taking advantage of his culpable conduct. (2 Par. Conts., 797, 798, and n. w.) He had a remedy by injunction

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(Hill. Inj., 631, 632; 2 Sto. Eq., 906; Will. Eq., 356, 360); and should have stopped the negotiation of the note.

II. The court erred in giving the instruction for defendant. It did not leave the question of negligence to the jury, as in the cases of Briggs vs. Ewart, (51 Mo., 245,) and Martin vs. Smylee, (55 Mo., 577,) referred to by counsel for defendant.

W. H. Brownlee, for Defendant in Error.

I. The note sued on being procured by fraud the contract is void, if one existed.

II. The signature to the paper sued on being procured by sleight of hand, being substituted in place of the receipt agreed to be signed, it is a forgery and is void. (Briggs vs. Ewart, 51 Mo., 245; Martin vs. Smylee, 55 Mo., 577.)

Hough, Judge, delivered the opinion of the court.

This was an action instituted by Shirts, before a justice of the peace against the defendant, Overjohn, as maker of a promissory note for \$200, dated October 19, 1872, and payable twelve months after date, to the order of T. England. There was a judgment for the plaintiff before the justice, and defendant appealed to the Linn County Common Pleas Court. At the trial in the Common Pleas Court, the note was read in evidence without objection, together with an endorsement and guarantee in blank by T. England, and also the following endorsement: "Credit fifty dollars on October 28th, 1872. H. Overjohn."

The defendant, Overjohn, testified as follows: "At the time I made the note sued on, the payee in said note came to me, and wanted me to act as agent for the sale of his plows. England, the payee, was to let me have three plows, but only left one, which was left as a sample to show to farmers, not to sell. At the time I signed the note sued on, I supposed I was giving a receipt for the plows, I never received the plows he promised to send nor anything else. There was no consideration of any kind for the note, which I thought and understood to be a receipt only."

On cross-examination the defendant said that England wrote the note, and he signed it. He afterwards learned that England was trying to sell the note, and he published a notice in the Brookfield Gazette, warning the public not to purchase it. The day after the advertisement, England called on him, feeling badly about the advertisement, and said that he had sold two of the plows; and that he would give him, defendant, credit on the note for fifty dollars.

England then wrote the credit of fifty dollars on the back of the note and defendant signed it. The editor of the Gazette testified that after a single insertion, the defendant withdrew the advertisement, and according to his best impression, said to him at the time, it was all right.

Plaintiff then offered his own and other testimony to show that he was a bona fide holder for value and before maturity of the note sued on, which testimony was objected to by the defendant, and excluded by the court, and plaintiff excepted.

The plaintiff asked the following instructions:

1. The jury are instructed that it stands admitted that the plaintiff in this suit purchased said note before it came due, for a valuable consideration, and without notice of any fraud between defendant and said England.

- 2. The jury are instructed that fraud cannot be presumed, but that it must be proven, and although the jury may believe from the evidence, that defendant did not know at the time he signed said note, that it was a note, yet if they believe from the evidence that the defendant placed his name on the back of the note, after he was aware that it was a note, and recognized it as a note, then they will find for the plaintiff.
- 3. It stands admitted that defendant signed his name on the back of the note in controversy, after he found out that it was a note.

The court refused to give the first instruction as asked, but gave all of it except that portion in italies, and gave the second instruction, and refused the third; to which action of the court, in refusing to give the third and the latter portion of the first instruction, plaintiff at the time excepted.

At the instance of the defendant, the court gave the following instruction: "That if the jury believe from the evidence, that Overjohn, when he signed the note sued on, did not fully understand its character, but thought and understood it to be a receipt for plows, for the sale of which he was to act as agent, and to account to England for them, they are bound to find for defendant." To the giving of which instruction plaintiff at the time excepted.

There was a verdict and a judgment for the defendant, and

plaintiff brings the case here by writ of error.

There were no pleadings in this case, and as there was no testimony of the defendant as to the purchase by plaintiff of the note sued on before maturity for value, and without any notice of any frand on the part of England, the court committed no error in refusing the first instruction as asked by the plaintiff. The prima facie presumption of law, that every holder of any negotiable paper is the owner of it; that he took it for value, before dishonor and in the regular course of business, would not have warranted the court in instructing the jury that such presumptions were admitted facts.

The third instruction asked by plaintiff should have been given. It clearly appears from the testimony of the defendant, that after he ascertained that he had signed a note to England, instead of a receipt, and England proposed to allow a credit of fifty dollars upon it, such credit was endorsed upon the note, and was accepted and signed by defendant. This testimony of the defendant constituted an admission as fully as if it had been embodied in an answer. The instruction given by the court on behalf of the defendant is seriously objectionable. It directed the jury to find for the defendant, notwithstanding the fact that he freely acquiesced in and ratified the execution of the note, with full knowledge of his mis-. take, and before England had negotiated it; besides, it is directly in conflict with the second instruction given for the plaintiff. But another, and, as we think, a very grave error, was committed in directing the jury in this instruction, to find for the defendant, if they believed from the evidence that he

did not fully understand the character of the instrument signed by him, and thought it to be a receipt and not a note, omitting all reference to the testimony of the defendant himself as to the circumstances under which he signed the note, which was all the testimony there was on that subject, and from which it plainly appears that the mistake of signing a note instead of a receipt, resulted solely from his own negligence and carelessness, without any constraint, artifice or fraud whatever on the part of England. Indeed, on the defendant's own testimony, the plaintiff was entitled to a verdict as a matter of law. The facts testified to by him constituted no defense to the plaintiff's action.

It would be exceedingly difficult to lay down with accuracy a general rule which would be applicable to all cases of this character which might arise; but the result of the best considered cases on this subject may be generally stated to be. that where it appears that the party sought to be charged, intended to bind himself by some obligation in writing, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining for himself the true character of such instrument before signing the same, but by his failure to inform himself of its contents, or by relying upon the representations of another, as to the contents of the instrument presented for his signature, signed and delivered a negotiable note in lieu of the instrument intended to be signed, he cannot be heard to impeach its validity in the hands of a bong fide holder.

In the case of Foster vs. Mackinnon, Law Reports, 4 C. P. 704, decided in 1869, Byles, J., delivering the opinion of the court, affirmed the charge of the chief justice at the assizes, in which he had directed the jury, that if the endorsement of the defendant of the bill of exchange sued on was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, he was not liable as endorser to a bona fide holder.

over

In the case of Whitney vs. Snyder, (2 Lansing, 477.) decided by the Supreme Court of New York in 1870, the action was against the defendant as maker of a promissory note, the plaintiff being a bona fide holder for value, before maturity. The defendant had offered to prove in defense, that he was unable to read, and that when he signed the note, it was represented to him, and he believed, that it was a certain other contract, offered to be also produced in evidence, and which purported to be a contract inter partes of an entirely different character. The testimony was rejected, and the Supreme Court held that it should have been received, on the authority of the case of Foster vs. Mackinnon, approving both branches 6.f the rule, as stated in that case, and say, "that it was in its circumstances, quite similar to the case at bar, except that the present is a somewhat stronger case for the defendant on the question of negligence." The case of Gibbs vs. Linabury, (22 Mich. 479,) approves the foregoing cases.

In the case of Chapman vs. Rose, (56 N. Y. 137,) decided by the Court of Appeals in 1874, it appears that the defendant entered into a contract, with one Miller, to act as agent for the sale of a patent hay-fork and pulley. A contract was filled out by Miller, and signed by both; also an order which was signed by the defendant for one of the hay-forks and two pulleys, for which, by the order, defendant agreed to pay nine dollars. These were delivered to the defendant. Another paper was then presented to the defendant for his signature. which Miller represented to be but a duplicate of the order. Defendant, without reading or examining it, signed and delivered it to Miller. The paper so signed was a promissory note for \$270, and was the note in snit. The plaintiff purchased in good faith before maturity. The judge charged the jury that if the paper sued upon was never delivered as a note, the plaintiff must fail in the action; and that, even if it was delivered, and the plaintiff neglected to make proper enquiry as to its origin, he was not a bona fide holder, and could not recover. Johnson, J., in delivering the opinion of the whole court, says: "There does not appear to have been any physi-

cal obstacle to the defendant's reading the paper before he signed it. He understood that he was signing a paper by which he was about to incur an obligation of some sort, and he abstained from reading it. He had the power to know with certainty the exact obligation he was assuming, and chose to trust the integrity of the person with whom he was dealing, instead of exercising his own power to protect himself. It turns out that he signed a promissory note, and that it is now in the hands of a holder in good faith for value. The question which arises on the branch of the charge now under consideration is, whether it is enough, as against a bona fide holder, to show that he did not know or suppose that he was signing a note, unless it also appears that he was guilty of no laches or negligence in signing the instrument. To that enquiry, the attention of the judge, at the trial, was distinctly called; and the instruction which he gave, and which was excepted to, did not submit, but excluded the consideration of it from the jury. It is quite plain that if the law is, that no such enquiry is admissible, a serious blow will have fallen upon the negotiability of paper. It will be a premium offered to negligence. To insure irresponsibility, only the utmost carelessness, coupled with a little friendly fraud, will be essential. Paper in abundance will be found affoat, the makers of which will have no idea they were signing notes, and will have trusted readily to the assurance of whoever procured it, that it created no obligation. To avoid such evils it is necessary at least to hold firmly to the doctrine that he who, by his carelessness or undue confidence, has enabled another to obtain the money of an innocent person, shall answer the loss." The cases of Foster vs. Mackinnon, and Whitney vs. Snyder, supra, and Putnam vs. Sullivan, (4 Mass., 45,) and Douglass vs. Matting, (29 Iowa, 498,) decided in 1870, are cited in support of the foregoing observations; and the charge of the judge presiding at the trial, was accordingly held to be erroneous. In the reasoning of that opinion and the conclusion reached, we entirely concur.

In the cases of Briggs vs. Ewart. (51 Mo., 245,) and Martin vs. Smylee, (55 Mo., 577) which were similar to the case at bar. the instructions which were brought under review, and which received the approval of this court, declared the law to be, that a person signing a promissory note could not be held liable as maker, by a bona fide holder, if his signature was obtained without his fault or negligence, on the fraudulent representations of the payee that the paper offered for signature was not a note, and that the party sought to be charged, did not know it was a note and did not intend to sign a note. Some observations, however, of the judge who delivered the opinion of the court in the case of Briggs vs. Ewart seem to reject the qualification of negligence, and to announce the broad doctrine, that to be binding, the instrument must be executed as, and for the paper it purports to be, and if the party to be charged did not intend to make a promissory note, he cannot be held bound even in favor of a bona fide holder for value. These observations and the subsequent case of Corby vs. Weddle, (57 Mo., 452,) in so far as it is based upon them, are disapproved.

We consider the rejection of the testimony offered by the plaintiff, an immaterial matter, as we do not think the defense made devolved upon the plaintiff the duty of showing by positive testimony that he was a bona fide holder for value before maturity.

The judgment will be reversed and the cause remanded; all the judges concur except Judge Vories, who concurs in the result.

Sherwood, Judge, delivered the following separate opinion.

The doctrine enunciated in Briggs vs. Ewart, (51 Mo., 245,) and, also, in that of Washington Savings Bank vs. Ecky, (Id., 272,) never met with my approval, as will be remembered by my associates who were on the bench at the time, although I did not take the precaution to have my formal dissent entered.

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Since then, however, I have caused myself to be placed on the record, in accordance with the opinion I had always entertained. (See Ayres vs. Milroy, 53 Mo., 516; Martin vs. Smylee, 55 Mo., 577.)

And I am truly gratified to see a well settled rule of commercial law, again in the ascendant. (Horton vs. Bayne, 52 Mo., 531.)

A. W. Frederick, Plaintiff in Error, vs. John Clemens, Defendant in Error.

1. Note signed under mistake as to its character—Negligence of maker—Fraudulent representations made to.—What question for jury.—Where one voluntarily signs a promissory note, supposing it to be an obligation of a different character, but has full means of information in the premises, and neglects to avail himself thereof, relying on the representations of another, he cannot set up such ignorance and mistake, as a defense against an innocent holder for value before maturity. (Shirts vs. Overjohn, ante, p. 305, affirmed.) If, however, his signature is procured without negligence on his part, and through artifice or fraudulent representation, the rule is different, and the jury should be left under appropriate instructions to determine these facts.

Error to Linn Common Pleas.

- A. W. Mullins, for Plaintiff in Error, cited in argument, Greer vs. Yosti. (56 Mo., 307;) Hamilton vs. Marks, (52 Mo., 78;) Horton vs. Bayne, (52 Mo., 531;) Corby vs. Butler (55 Mo., 398).
- S. P. Houston, for Defendant in Error, cited Briggs vs. Ewart, (51 Mo., 245;) Martin vs. Smylee, (55 Mo., 577;) Corby, Ex'r, vs. Weddle (57 Mo., 452).

Hough. Judge, delivered the opinion of the court.

This was an action on a negotiable promissory note, for the sum of \$300, brought by the plaintiff, as indorsee for value before maturity, against the defendant as maker.

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The defendant, in his answer, admitted the execution of the note and its assignment to the plaintiff, but alleged that said note was without consideration, and that his signature thereto was obtained by imposition and fraud; that, being unable to read or write more than his own name, the payee in said note falsely represented to him, when said note was presented to him for his signature, that it was simply a receipt for certain plows, which said payee had agreed to deliver to him. The answer further stated that the plows were never delivered, and that plaintiff had knowledge of all said facts before the assignment to him of said note.

Plaintiff replied, denying all the matters set up by the defendant in avoidance of his liability; and averred that he was a purchaser of said note in good faith, before maturity, and without notice of any equities between the original parties thereto, or of any defect in the title of the payee.

At the trial, the defendant testified, in effect, that, at the time he gave the note sued on, he entered into an agreement with one England, the payee in said note, to pay him, for the right to sell a certain gang-plow in three townships in Linn county, whatever should be received by him on the sale of said plows, in excess of a specified sum, and in order "to secure England in this, gave him the note sued on, believing at the time it was a contract." He did not then examine the note. He could not read well, and could write but little, and did not have his spectacles with him, without which he could not read at all. England wrote that part of the contract which was not printed, and read it all to him, and he understood it to be simply a contract to secure to England his portion of the proceeds of the sale of the plows; and if he had known it was a note he would not have signed it.

On cross-examination, defendant stated that England read over the instrument to him which he was asked to sign, and "it read \$300 payable in twelve months." He further stated that he told plaintiff, who called on him with the note in his possession, after the assignment and a short time before it became due, that he made the note, but that he got nothing

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for it. When re-examined, he stated that he told plaintiff that he would not pay it, that he got nothing for it, and that he did not sign it as a note. The foregoing is the substance of the defendant's account of the circumstances under which he signed the note, and of the obligation he intended to incur. There was other testimony but it will not be necessary to notice it.

The court gave, at the instance of the defendant, the following instruction: "If the jury believe from the evidence, that Clemens, when he signed the note sued on, did not understand its character, but thought he was signing a contract to account to England for the proceeds of plows, for the sale of which he was to act as agent, then they are bound to find for the defendant;" to the giving of which plaintiff excepted.

Exceptions were also saved to the giving of two instructions, asked by the defendant, on the subject of notice, and to the refusal of one asked by the plaintiff on the same subject. These instructions, as the case is now presented, need not be considered.

There was a verdict and judgment for the defendant, and the plaintiff has brought the case here by writ of error.

The precise question presented by the instruction above set forth, was passed upon in the case of Shirts vs. Overjohn, decided at the present term; and it is unnecessary to repeat here the views there expressed. The instruction under consideration is at variance with the rule laid down in that case, and must, therefore, be held to be erroneous.

In this case, however, it should have been left to the jury to say, on this issue, under proper instructions, whether the defendant, without negligence on his part, signed the note sued on, in ignorance of its true character, through any artifice or fraudulent representations on the part of England.

The judgment will be reversed and the cause remanded; all the judges concur, except Judge Vories, who is absent.

Leach v. Cargill, et al.

WILLIAM S. LEACH, Respondent vs. Agnes Cargill, et al., Appellants.

Municipal charter—Power of officers limited by.—The law is well settled that
the power of municipal authorities is confined to the limits prescribed by the
charter, and ordinances in conformity therewith.

2. Special taxes—Failure of city engineer in pursuance of ordinance, to permit property owners to macadamize part of street adjoining.—Where an ordinance for the macadamizing of a street, provides that the city engineer shall give the adjoining property owners the privilege of doing the work in front of their property, proof of failure to give such opportunity will defeat an action on a special tax bill against one of said property owners. And a mere newspaper advertisement for proposals for said macadamizing will not amount to such offer, unless made to have that effect by the terms of the ordinance.

Appeal from Buchanan Common Pleas.

J. W. & J. D. Strong, and Hedenburg and H. M. Ranney, for Appellants.

The petition should aver that the opportunity of improving the adjoining part of the street was given the property holders, and the defect was fatal.

B. R. Vinyard, for respondent.

I. The ordinance providing for giving the owners this privilege was directory, and if the engineer had given them no notice plaintiff ought not to have been made to suffer. (Neenan vs. Donoghue, 50 Mo., 495.)

II. Besides, the ordinance did not require the engineer to give the owners notice. It directed him to give them the "privilege" of doing the work in front of their lots. There is no evidence that they were refused the privilege or ever applied to do the work, proposals for which were publicly advertised.

III. The evidence of the advertisement for proposals was proper, as showing that the defendants were notified, at least constructively, that the work was to be let, so that if they desired they might do the work in front of their lots.

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Sherwood, Judge, delivered the opinion of the court.

Action on two special tax bills for macadamizing, &c., a certain portion of Edmond Street, between 8th and 10th streets.

There are numerous points presented by the record, but attention will only be centered on one, as it is decisive of this case.

It is well settled law in this State, as well as elsewhere, that the power of the municipal authorities is exclusively confined to the limits prescribed by the charter, and such ordinances as are passed in conformity thereto. (Kiley vs. Op-

penheimer, 55 Mo., 374, and cases cited.)

The ordinance of September 9th, 1870, requiring the work in question to be done, made special provision that the city engineer should give "the owners of property fronting on said street the privilege of doing said work in front of their property." This ordinance was a law equally as binding upon the city as upon the citizen; and there is no warrant whatever for the position assumed by plaintiff's counsel, that the clause first quoted is merely directory. Such a construction would effectually fritter away all the rights of the citizen, as now secured both by charter and by ordinance, and leave them at the mercy of those, who, feeling themselves unfettered by any legal restraint, might not long hesitate in making a most improper and oppressive use of the power thus surrendered into their hands.

These proceedings to compel the citizen to pay for improvements in front of his property, are proceedings in invitum, purely statutory, and therefore to be strictly construed. To enunciate any other rule than this would be to gravely announce the doctrine, that while the municipal law would be binding on the citizen, the representatives of the city could at pleasure disregard such law. No ruling of this kind will therefore be made.

As the city engineer failed to comply with the ordinance referred to, by giving the property owners an opportunity to perform the necessary work, and as it is seen from the foregoing

remarks, that such compliance was the only basis which would authorize a recovery, it must follow that plaintiff's action cannot be maintained. Nor can the mere advertisement in a newspaper for proposals to do the work required, be deemed an observance of the ordinance, since that notice was addressed not to those interested; but to a class who are on the lookout for such undertakings.

It is not denied that the city might by ordinance provide that such advertisement should be tantamount to giving the owners the privilege of doing the work; but it is quite sufficient to say that in the present instance this was not done. The doctrine of constructive notice is altogether the creature of statutory enactment, and has no existence until it receives legislative recognition.

Judgment reversed and cause remanded; the other judges concur.

LOUDEN WILLIAMS, Appellant, vs. James K. Wall, Respondent.

1. Gaming contract—Draft given in payment of bet, and money collected by indorsee—Liability to owner in case of knowledge of wager—In case of ignorance.—The indorsement of a draft, by the owner, in payment of a gambling debt, although the paper were issued prior to the incurring of the debt and for a legal consideration, comes within the inhibition of the Gaming Act; (Wagn. Stat., 661.) and in contemplation of that statute, the indorsed draft may be treated as a security or a new bill. Such indorsement under the statute is void and conveys no title. And where the draft is assigned or transferred by the party receiving it, to another, also cognizant of the facts, who collects the amount, he will be held to have converted the instrument and its proceeds, and will be liable to the owner for sum collected. And, semble, that the sams liability will attach, even though such third party be ignorant of the wager. (See Koch vs. Branch, 44 Mo., 542.)

Appeal from Buchanan Circuit Court.

B. R. Vineyard, for Appellant.

I. Defendant, Wall, even though an innocent party, was liable for the conversion of the draft. (Koch vs. Branch, 44 Mo., 542; Chapin vs. Drake, 75 Ill., 295; Edw. Bills, § 337; Sto. Prom. Notes, § 192.) Much more was this the case where, as was here the fact, he had knowledge. (Lyle vs. Lindsey, 5 B. Monr., 123; Pope's Adm'r vs. McKinney, 3 B. Monr., 93.)

Bennett Pike, for Respondent.

I. The first two sections of the statute touching gaming, confine the action to that by the loser, his heirs, etc., against the winner; and the third and fourth sections do not include drafts executed by outside parties and simply held by those to the wager. This is not a suit to collect money on a note or other security, the consideration of which is money won at gaming, but simply to recover the value of a draft as money lost at gaming.

The statute will not authorize an action of this sort against one who is merely a collector for the winner.

Sherwood, Judge, delivered the opinion of the court.

Our attention has been specially called to the plaintiff's second count.

It charges in substance that on the 3rd of October, 1873, and within three months of the commencement of his action, the plaintiff was the owner of a certain draft for \$1,100, drawn by the Citizens' Bank of Greensbury, Indiana, on the 3rd National Bank of N. Y. City; that one Bailey, a gambler, induced plaintiff to endorse and put up as a stake on a game of chance called "three card monte," the said draft, and thereupon won the same from him; that Bailey having thus become the possessor of the draft, acquainted the defendant with all the above related circumstances, in reference to the draft, and induced him, in consideration of an agreement that defendant might retain \$100 of the amount of the draft when collected, to take steps for its collection; that, in pursuance of this fraud-

ulent design against plaintiff, Bailey indorsed and delivered the draft to defendant, who in turn indorsed and delivered it to a banker, ignorant of the circumstances, who collected the same from the bank on which it was drawn, also, ignorant of any wrong having been done, paid the proceeds to defendant, who, retaining therefrom the sum agreed upon, paid the residue to Bailey; that by reason of the premises and the acts of the defendant, the draft, without consideration, was lost to the defendant, and the sum of \$1,100, the proceeds arising therefrom, received by defendant to plaintiff's use; for which he asked judgment. These allegations were held not good on demurrer.

I. The first section of the act in relation to gaming (Wagn. Stat., 661), allows a recovery of money or property won thereby, by any person; and is not at all restrictive in its operation as to the person or persons, from whom such recovery may be had.

The heirs, legal representatives and creditors of the losing party are, however, limited by the terms of the second section to a recovery against the *winner* alone.

The third section declares void all judgments by confession, conveyances, bonds, bills, notes and securities, when the consideration is money or property won at any game or gambling device. Provision is also made by that section to vacate such judgments, and to cancel such notes, etc., by proper procedure on the part of the person directly interested, his heirs, legal representatives, creditors, etc.

The fourth section prevents the assignment of any bond, bill, judgment, etc., from affecting the defense of the person executing the same.

And the ninth section limits the period wherein action must be brought for the recovery of money or property to three months.

II. The central idea of the act before us, which is evidently in aid of the statute defining and punishing gambling as a criminal offense, is to discourage and suppress gaming by the most effective of all methods, that of preventing the gambler

from retaining the spoils of his nefarious vocation, and from successfully transferring them to colleagues as unscrupulous as himself.

HI. No doubt is entertained that the indorsement from plaintiff to Bailey, falls within the inhibitions of the act under consideration, as it is a fresh and substantive contract and may be regarded either as a security (2 Bouv. L. Dict., 493), or as a new bill (Slacum vs. Pomery, 6 Cranch, 221; Coffee vs. Planters Bk. of Tenn., 13 How., 183; Van Staphorst vs. Pearce, 4 Mass., 258), within the meaning of that act; and unless such construction be given thereto, the wholesome provisions of this statute can with ease be evaded, by simply indorsing for gaming purposes, antecedent securities, whose con sideration is altogether legal; thus defeating the evident in tent which gave origin to the statute. No such view of the law can therefore be entertained.

In Illinois, under a similar prohibitory enactment, it was held that an indorsement of a draft was in the purview of the law, although not expressly named therein. (Chapin vs. Drake, 57 Ill., 295.)

IV. As the indorsement, under the statute, was absolutely void, no title to the draft or authority to deal therewith, passed to Bailey or to his immediate transferee, the defendant. (Edw. Bills, etc., 337; Sto. Prom. Notes, §§ 192, 193.) And as the latter received and collected the draft with full knowledge of all the attendant facts, his acts cannot be otherwise regarded than a conversion of the draft and of its proceeds. For "a wrongful taking or assumption of a right to control or dispose of property, constitutes a conversion. Indeed any wrongful act, which negatives or is inconsistent with the plaintiff's right, is per se a conversion." (Schroeppel vs. Corning, 5 Denio, 236.)

In Stephens vs. Elwall, (4 Maule & Selw., 259), Lord Ellenborough, where a clerk acting "under an unavoidable ignorance," and for his master's benefit, had shipped the goods to his principal, remarked, "a person is guilty of a conversion who intermeddles with any property and disposes of it, and it is

no answer that he acted under authority from another, who had himself no authority to dispose of it."

In Koch vs. Branch, (44 Mo., 542), a commissary voucher was collected for, and paid over to, the innocent purchaser of such voucher by an agent, who charged for his services no commission; and yet the agent, in that transaction, was held liable to the true owner, for the value of the voucher thus disposed of.

And authorities are not wanting, the case last cited being of the number, that the same liability attaches to the unauthorized act, whether the actor was conscious of the wrong he was committing or not. (Koch vs. Branch and Chapin vs.

Drake, supra.)

But the plaintiff's allegations do not require the extension of the rule, so far, in the case at bar; as here the fact of notice is expressly alleged. For these reasons, then, under the circumstances detailed in the petition, the act of the defendant in collecting and disposing of the proceeds of the draft in the manner stated, was as much unauthorized, as much a conversion, and gave rise to as valid a cause of action against him, as though he had, in the first instance, picked up the draft on the street.

If the draft had been received by the defendant for collection, and after collecting its proceeds, he had been notified by the true owner not to pay them over to Bailey, no one would feel hesitancy, had the defendant acted in disobedience of such notification, in asserting his unquestionable liability. How then, is the case unfavorably altered for the plaintiff, because such notification came before hand and contemporaneously with the reception of the draft?

Judgment reversed and cause remanded; All the judges concur.

EDMUND WHALEN, Respondent, vs. The St. Louis, Kansas City and Northern Railway, Appellant.

- 1. Damages—Injuries by railroad train—Contributory negligence—Causes, remote and immediate.—Although one injured by a railroad train was guilty of some negligence which contributed to the injury, yet if those in charge of the train might have avoided the injury by the exercise of ordinary care and prudence, the company would be-liable, provided that the negligence of the one injured was the remote or incidental, and that of the road the direct, cause of the accident.
- 2. Instructions—Rejection of particular ones improper, when the aggregate states the law properly.—If instructions taken as a whole declare the law properly, and are neither inconsistent nor misleading, the fact that any particular one is partial or defective, is no ground for its rejection.
- 3. Damages by railroad to person—Loss of limb—Measure of damages, etc.—In assessing damages for loss of limb caused by a railroad, the jury should consider the age, situation, bodily suffering and mental anguish of the person injured, and the loss sustained by him in consequence, and the extent to which he was thereby disabled from self-support.
- Personal injuries by railroad—Negligence—Intoxication.—One standing in a state of intoxication, on a railroad track at the usual time of running of the train, and in a position of exposure, is guilty of negligence.
- 5. Railroads—Crossing used by passingers—Diligence of company and passengers—What necessary.—Where a railroad track is crossed by a path commonly used by passengers, trains should use great diligence to guard against accident; and a like diligence and caution devolve upon passengers.
- Damages--Eccessive-Interference by Supreme Court.—The Supreme Court
 will not ordinarily interfere on the ground of excessive damages.
- 7. Newly discovered evidence, merely cumulative, no ground for new trial.—A motion for new trial should not be granted on the ground of newly discovered evidence which is merely cumulative.

Appeal from Ray Common Pleas.

C. T. Garner, for Appellant.

I. The agents of defendant had no right to presume that there was any one upon the track, especially as it was the usual time for running the train, and at night (Penn. R.R. Co. vs. Henderson, 33 Penn., 325; Ch. & R. I. R. R. Co. vs. Still, 19 Ill., 499; Burham vs. St. L. & I. M. R. R. Co., 56 Mo., 338; Robinson vs. Cue, 22 Vt., 213; Redf. Railw., § 193 and authorities cited; 44 Penn. St., 375; Finlayson, Adm'x, vs. The Ch., B. & Q. R. R., 1 Dill., 579); and would be held only if, after becoming aware of plaintiff's danger, they

failed to use ordinary care to avoid injuring him. (Ill. Cent. R. R. Co. vs. Godfrey, Am. Law. Reg., May 1875, p. 294.)

II. The plaintiff's fault contributed to and was the cause of the injury, and he had no right to recover. (Stuck vs. The Milw. & Miss. R. R. Co., 9 Wis., 202; Brown vs. Kendall, 6 Cush., 331; Schaabs vs. Woodburn Sarven Wheel Co., 56 Mo., 173; Morrissey vs. Wiggins Ferry Co., 43 Mo., 383, and authorities there cited; Redf. Bail. & Car., § 360, p. 276; Whart. Neg., §§ 300, 341; 12 Metc., 415; 6 Hall, 592.)

III. Plaintiff had no right to walk along the track where there was no crossing or street; and if he was so walking there, he must abide the consequences of the risk and perils thus negligently and carelessly assumed. (Ill. Cent. R. R. Co. vs. Godfrey, Am. Law Reg., May 1875, p. 290; Aurora Rail Co. vs. Ginnis, 13 Ill., 585.)

IV. A passenger on board a railroad car, and a person on foot in the street, or on the track, do not sustain the same relation to the railroad company. (Brand vs. Railroad, 8 Barb., 368; Ang. & Ames Corp., § 388, p. 404, 8 ed.)

V. The court should reverse on the ground of excessive damages. (Sawyer vs. Hann. &. St. Jo. R. R. Co., 37 Mo., 240; Pratte vs. Blakely, 5 Mo., 205; Goetz v. Ambs, 22 Mo., 170; Collins vs. Alb. & Schenec. R. R. Co. 12 Barb., 492; Clapp vs. Huds. River R. R. Co., 19 Barb., 461; 21 Mo., 354.)

Donaldson & Farris, for Respondent, cited in argument, Brown v. Hann. & St. Jo. R. R. Co., 50 Mo., 461.

WAGNER, Judge, delivered the opinion of the court.

This was an action for damages inflicted by a train of cars on defendant's road, in crushing plaintiff's foot, whereby it became necessary to have one of his legs amoutated.

The facts in the case are briefly these: The Richmond and Lexington junction, where the accident happened, is in a small town, and the depot is surrounded entirely by railroad tracks, so that in going to the depot it is necessary to cross a track, from whatever side it is approached. On the night

when the injury occurred, between eight and nine o'clock the plaintiff, as he alleges, started to go to the depot for the purpose of taking passage on the train, and walked down the track towards the depot. The testimony shows that there were three ways by which the depot was reached. One was by a traveled road, another by what seems to have been a path, and the other down the track. And all these ways were in common use.

The evidence strongly shows, that on the night in question the train that injured plaintiff was backed up, and had on it no head light, and did not ring the bell or sound the whistle to give any warning of its approach. There was evidence introduced to show that plaintiff was intoxicated, and evidence of a contrary character was also given.

The facts were exclusively for the determination of the jury; and, to see whether the court correctly instructed them on the law, it will be as well to insert the declarations.

The first two instructions given for the plaintiff are immaterial. The third was, "that if the jury believe from the evidence, that the defendant, through the negligence or carelessness of its agents, and without negligence on the part of the plaintiff, inflicted upon the plaintiff the injuries mentioned in the petition, they will find for the plaintiff, and assess his damages at such sum as they may think he is entitled to, not to exceed the amount of fifteen thousand dollars, the sum claimed in the petition."

The fourth instruction declared, that "even if the jury should believe from the evidence, that the plaintiff was guilty of negligence which contributed to the injury, yet if they should further believe that the agents or servants of the defendant, managing the locomotive or machinery with which the injury complained of was inflicted, might have avoided the injury by the use of ordinary care and caution, the jury will find for the plaintiff."

The fifth instruction told the jury that if they found for the plaintiff, they should, in estimating the amount of the damages, take into consideration the age and situation of the

plaintiff, his bodily suffering and mental anguish resulting from the injury received, and the loss sustained by the want of the limb injured, and the extent to which he was disabled from making a support for himself, by reason of the injury received.

For the defendant the court declared as follows:

- 1. "The defendant had the legal right to the use of its own track, and the right to run and operate its locomotive and train of cars thereon at any time, in conducting its ordinary business, either in the day or night, and either backwards or forwards. And if the jury believe from the evidence, that defendant, by its agents and employees, at the time mentioned in plaintiff's petition, used reasonable and ordinary care, skill, diligence and prudence in moving said train from the side track on to the main track, and that at the time of starting on said main track the whistle was sounded, and that said agents and employees used reasonable and ordinary care. skill and caution, in running said train on said track to the point where the injury complained of occurred, then the jury must find for the defendant. The reasonable and ordinary care, skill and prudence which the law requires, is such care, skill and prudence as might be expected from an ordinary careful, skillful and prudent man in like situation and circumstances."
- 3. "If the jury are satisfied from the evidence, that the plaintiff, by the exercise of ordinary care, diligence and prudence, might have avoided the injury complained of, the jury will find for the defendant. The ordinary care, diligence and prudence which the law required of the plaintiff is the exercise of such caution, prudence and diligence as was proportioned to the danger to be avoided, judged by the standard of ordinary prudence and diligence."

4. "If the jury believe from the evidence that the plaintiff, by his own carelessness and negligence, contributed to and was the proximate cause of the injury complained of, he is not entitled to recover in the cause, and the jury will find for the defendant."

5. "If the jury believe from the evidence that plaintiff, while intoxicated, and at the usual and ordinary time of defendant's running its train on said track, was on said track, or standing between the rail of the track and the platform of the freight depot, then the plaintiff was guilty of negligence."

8. "If the jury believe from the evidence that defendant, by its agents and employees, had used reasonable care, skill and prudence in running said train on said track, and that from the point where said plaintiff was on the track, there was a plain view of said train, and that plaintiff, by the exercise of ordinary care and prudence, could have seen or heard the train approaching, and could, by the exercise of ordinary care and prudence have avoided the train and injury complained of, then the jury will find for the defendant, if they further find that the train was being run at the time with reasonable care, skill and prudence, and at a slow rate of speed."

To the first instruction for the plaintiff above copied, being the third in the series, there can be no objection whatever. If the injury was inflicted through the negligence of defendant's employees, without negligence on the part of the plaintiff, there could be no question of the plaintiff's right to recover.

The fourth instruction, taken by itself, is somewhat imperfect. It asserts the proposition, that though it should be found that plaintiff was guilty of some negligence which contributed to the injury, yet if those managing the defendants' train might have avoided the injury by the exercise of ordinary care and prudence, the defendant would still be liable. This instruction leaves out of view, whether plaintiff's negligence, which was a contributory cause, was proximate and direct, or whether it was merely remote. If the plaintiff's negligence was simply incidental or remote, and defendant's want of prudence was the direct cause, then, under many decisions of this court, defendant's liability was undeniable. But the instructions of the court must all be taken together. They constitute the entire charge of the court, and if defects

or omissions in one instruction are supplied in another, and they are both consistent, and not misleading in their tendency, then the error in the first is remedied, and no complaint can be made.

The fourth instruction given at the instance of the defendant must be read in connection with the one just mentioned, and that told the jury that if the plaintiff, by his own carelessness and negligence, contributed to and was the proximate cause of the injury complained of, then he was not entitled to recover. This supplied the omission in the former instruction and precluded a recovery, if plaintiff's negligence directly or proximately contributed to the injury.

The fifth instruction informing the jury on what basis they

should assess the damages, is not objectionable.

The first of defendant's instructions was certainly sufficiently favorable to it. It was declared by it that the defendant had the legal right to the use of its track, and if it was found that the employees, when they moved the train sounded the whistle and used reasonable and ordinary care and prudence, then the verdict should be for defendant. It was obviously, therefore, found that the whistle was not sounded, and that the requisite prudence was not exercised. This whole question was of course one for the jury; but it may be remarked that the evidence seems very clear, that on the night the accident happened the whistle was not sounded, the bell was not rung, and there was no light placed at the end of the train.

The third instruction directed a verdict for the defendant, if it was found that the plaintiff might have avoided the injury by using ordinary care and prudence; and this would seem to imply, as there was no qualification annexed to it, that defendant would have been exonerated, even if it had been remiss in its duty; which goes further than our previous adjudications warrant.

The question of plaintiff's intoxication was strongly put in the fifth request; and it was negatived by the finding.

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The eighth instruction is an amplification of the third, and absolved the defendant from all responsibility, if the plaintiff was negligent or might have escaped the injury by ordinary prudence and care on his part.

The instructions are unobjectionable. Taken as a whole, they are favorable to the defendant.

The defendant, it is true, had the right to the use of its track, free from molestation or intrusion; but its depot was surrounded by railroad tracks, and it could only be reached by crossing the track. Persons in approaching it were accustomed to fake the same course that the plaintiff did; and owing to the peculiar circumstances, great diligence should have been used to guard against accident.

As it was a dangerous place, equal diligence and prudence devolved on persons in plaintiff's situation. It was their duty to use their senses, and always be on the watch against approaching danger. But this view of the law was fairly submitted to the jury, and we must accept their verdict as final.

The plaintiff was awarded \$8,000 as damages, and we would have been better satisfied, under all the circumstances, if the amount had been less; but still we do not think that we would be justified in interfering.

The defendant, among other reasons for a new trial, stated that it had discovered new evidence; but the affidavits disclose that the evidence was merely cumulative, and a new trial will never be granted for that.

I think the judgment should be affirmed; the other judges concur; Judge Hough in the result.

John Hosher, Appellant, vs. The Kansas City, St. Joseph & Council Bluffs Railroad Company, Respondent.

Railroad—Location on land not ceded—License for—Road not trespasser, when.

—Where a railroad is located on land other than that granted, but with the knowledge of the owner who makes no objection, but declares his intention to claim damages, the company cannot be held as a trespasser or wrong doer?

Hosher v. Kas. C., St. Jo. & Council Bluffs R. R. Co.

2. Railroads—Damages caused by surface water—By diversion of watercourse—Rule as to company's liability.—Where damages caused by the construction of a railroad, result from the flooding of surface water, and not the diversion of a natural stream or water course, the company will not be liable, if, in such construction, the company is reasonably prudent and careful to avoid injury. (Munkers vs. Kansas City, St. Joseph & Council Bluffs R. R. Co., post p. 334.)

Appeal from Nodaway Circuit Court.

William Heren, for Appellant.

I. By the instructions given for respondent, the court says that if a railroad cuts its ditches and makes its embankments with reasonable skill, it may collect surface water for a mile or more, direct it from its usual course and flowage, open a water gap or sluice, and overflow a man's land and ruin his crops, and not be liable, because the water, with which he does it, is surface water, collected in ditches skillfully made for that purpose. Such cannot be the law. (See McCormick vs. K. C., St. Jo. & C. B. R. R. Co., 57 Mo., 433; Ang. Wat. Cours., 130, § 108; 136, § 108; Wapple vs. N. Y. Central R. R. Co., 58 Barb., 413; Clark's Adm'x vs. Hann. & St. Jo. R. R. Co., 36 Mo., 223.)

Willard P. Hall, for Respondent, cited Jones vs. Hannovan, 55 Mo., 465; McCormick vs. K. C., St. Jo. & C. B. R. R. Co., 57 Mo., 433; Johnson vs. Lewis, 13 Conn., 306; Pillsbury vs. Moore, 44 Mo., 154; Plumer vs. Harper, 3 N. H., 88; Ang. Wat., § 403; Douglass vs. Stephens, 18 Mo., 362; Waters vs. Brown, 44 Mo., 303; 19 U. S. Digest 506, § 20.

WAGNER, Judge, delivered the opinion of the court.

The petition in this case stated that the defendant was the successor of the Missouri Valley Railroad, and that the latter company wrongfully entered upon the lands of the plaintiff, and built and constructed its road bed, and did the same in a negligent unskilful and improper manner; that it threw up embankments and failed to open proper and sufficient culverts and openings, at proper places, whereby plaintiff's land was overflowed to his damage, etc.

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The answer of the defendant denied all the material allegations in the petition, and also set up a written and verbal license from the plaintiff, to enter upon the land and construct the road.

Evidence was introduced tending to prove the allegations in the petition, and also tending to establish the facts set up in the answer, and that the works and embankment of the road were a benefit to the plaintiff instead of an injury.

The cause was tried before the court with a jury, and there was a verdict and judgment for the defendant.

For error, the appellant relies mainly, in this court, on the refusal to give his fourth and fifth instructions, and the giving of the sixth instruction by the Circuit Court of its own motion.

The fourth instruction refused merely declared, that if defendant's road-bed was constructed in an unskilful, negligent and improper manner, and that in consequence thereof plaintiff's land was overflowed, then, he was entitled to a verdict for damages.

The court had just given the three preceding instructions asked for by the plaintiff, and they in substance told the jury that if the company in the building of its road, by throwing up embankments or otherwise, diverted a stream from its natural channel, or turned it so that it overflowed plaintiff's land, then defendant was liable for damages.

And the further proposition was asserted, that it was not necessary that the stream or branch should be a living one, or one constantly running with water, but it was sufficient if the water ran in it a part of the year, and was made up from the running of surface water.

The jury from their verdict found that there was no turning or diversion of a stream of water, or changing the natural flow, after it had reached an accustomed bed. This was the allegation in the petition, and its existence was negatived by the verdict, and so there could have been no question of negligence on the subject.

The fifth instruction refused was predicated on a different hypothesis. It asserted that if the company built its road on

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plaintiff's land without procuring the right of way, or having the right of way condemned under the provisions of the statute, then the defendant was liable to the plaintiff for all damages caused by the overflowing of his land, in consequence of the building and construction of the road; and it made no difference whether the overflowage was caused by the diversion of streams or branches, or the collection of surface water.

In lieu of the above, the court gave a declaration, that if it was found from the evidence that the plaintiff gave the company the right of way, or permission to build the road over his land, at a certain place, such right of way would not authorize the company to build the road any where else over his land; but if the company built the road elsewhere with the knowledge of the plaintiff and without any objection from him, the plaintiff stating to the agents of the company that he would make the company pay for the land, the company, under such circumstances, would not be a wrong doer, but would have the right to construct its road-bed in the usnal and proper manner, by throwing up and raising the ground for the way-bed, and cutting ditches along the side to keep the water off from the track of the road. And if it was found that the company made its road-bed and ditches with reasonable skill, and the plaintiff was incidentally injured thereby, by the flow of surface water on his land, he could not recover for an injury caused by the collection of such surface water; but, if, in the construction of the road-bed and ditch, the company diverted the water of a stream or watercourse from its usual channel or course, and caused it to flow on plaintiff's land, thereby rendering the same less useful for cultivation, then the verdict should be for the plaintiff.

There was evidence submitted on the trial, going to show that plaintiff had granted the right of way to the company in writing, to build its road on the land, and there was further evidence, showing that the road was located and built on a different part of the land from that granted—and that the plaintiff knew of the same and made no objection, but said that he should demand damages.

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The jury obviously found that the road was constructed under the license of the plaintiff, and that the company was not a trespasser or wrong doer, and that the water which occasioned the injury complained of, resulted from surface water and not the diversion or turning of a stream or bed in a branch.

The law applicable to the gathering and turning off of surface water, then, must govern thecase. It is, unquestionably, true, that no man has a right to ameliorate his estate to the detriment of another's; no person should be allowed to make his property more valuable by making his neighbor's less valuable. No person would have the right to protect himself from a natural stream by throwing it on the lands of another, or, on the ground of self protection, to prevent the waters of floods and freshets from flowing where they are accustomed to flow.

But in the case of surface water, which is regarded as a common enemy, he is at liberty to guard against it, or divert it from his premises, provided he exercises reasonable care and prudence in accomplishing that object. In the language of this court in a recent case, where this subject was carefully considered, the owner of the dominant or superior heritage "must improve and use his own lands in a reasonable way, and in so doing he may turn the course of, and protect his own land from, the surface water flowing thereon; and he will not be liable for any incidental injury occasioned to others by the changed course in which the water may naturally flow, and for its increase upon the land of others. Each proprietor, in such case, is left to protect his own lands against the common enemy of all." (McCormick vs. K. C., St. Jo. & C. B. R. R., 57 Mo., 433; Peter Imler vs. City of Springfield, 55 Mo., 119; Jones vs. Hannovan, Id., 462.)

The instruction enunciates the very doctrine laid down by this court in the case cited, and was drawn up in conformity with it.

As we have failed to find any error in the declarations, the judgment must be affirmed; the other judges concurring.

WILLIAM MUNKERS, Respondent, vs. THE KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS RAILROAD Co., Appellant.

- Railroads—Relinquishment of right of way to road "along section line,"
 meaning of.—Under an agreement relinquishing to a railroad company a right
 of way one hundred feet wide, over a tract of land situated in two sections of
 a township, the railroad was to be located "on the section line." Held, that
 the company would not forfeit its right to the land, because its track was not
 laid immediately on and along the section line, provided that it was constructed
 within the limits of the one hundred feet, and that this strip embraced that
 line.
- 2. Pleadings—Damages caused by diversion of stream; by surface water—Variance,—Where plaintiff charges that his land was flooded and damaged, by the diversion, by a railroad company, of a stream of water from its natural channel, he cannot recover, on proof showing that the injuries were caused solely by surface water. And the distinction between the cases and the relative liability of the company should be explained to the jury under appropriate instructions.

Appeal from Andrew Circuit Court.

W. P. Hall, with C. A. Mossman, for Appellant.

I. The grant is for a right of way one hundred feet wide. The railroad had the right to use the whole of said one hundred feet for railroad purposes. The term "Railroad," has no proper application as signifying road bed or track. The term "road bed" or "track" has such a signification, and is the proper term to use in the grant, if intended to be given only on the condition that the road bed was located on the line.

Particular words as, "on the line of a railroad," in a contract for the sale of land do not necessarily imply that the land is bounded on one side by a railroad. (Burnham vs. Bank, 45 Mo., 349; Marshall vs. St. L. & I. M. R. R., 51 Mo., 138; Chicago vs. Sheldon, 9 Wal., 50.)

We contend that the terms of the deed are satisfied, if any portion of the right of way is on the section line, and includes it.

II. There was no evidence of the turning of a stream or natural water-course, and for the diversion of surface water, to prevent it coming on our land, we are not liable. (Mc-Cormack vs. K. C., St. Jo. & C. B. R. R. Co., 57 Mo., 433;

Parks vs. City of Newburyport, 10 Gray, 28; Gannon vs. Hagardon, 10 Allen, 106; Flagg vs. City of Worcester, 13 Gray, 601; Inhabitants of Franklin vs. Fisk, 13 Allen, 211; Ashley vs. Wolcat, 11 Cush., 192; Turner vs. Inhabitants of Dartmouth, 13 Allen, 291; City of Bangor vs. Lanril, 51 Me., 521; Luther vs. Winnesemet Co., 9 Cush., 171; Hoyt vs. Hudson, 27 Wis., 656.)

J. P. Altgeld, for Respondent.

I. The term "railroad" in this case, must be construed according to its commonly accepted meaning in the community at large, not according to its meaning among a particular class; the object being to determine how the parties understood it at the time the contract was made. (Pavey vs. Bush, 3 Mo., 447; 1 Blacks., 59; 14 Mo., 3; 13 Mo., 191; 16 Mo., 436; 25 Mo., 13; 2 Sto. Cont., 1; 2 Pars. Cont., 5 ed. p. 494.) And as used in the community, and particularly in farming communities, it is understood to mean the embankment or road bed, together with the ties and rails. Therefore, when respondent inserted in the conveyance of right of way the condition that the road should be built on the section line, he meant that the road bed should be built on it, and, moreover, the testimony shows that it was so understood by all parties at the time of the conveyance. (2 Gray, 274.) The "one hundred feet" are always determined by measuring fifty feet each way from the centre of the road. For, whenever the road or road bed makes a curve, the "one hundred feet curve with it, and whenever you shift the road bed you shift the "one hundred feet."

II. On the question of flooding, the instructions given by the court were favorable to the defendant and appellant, and the judgment should not be molested. (1 Redf. Railw., 290, 296, 333; 2 Kennan, N. Y., 486; Easterbrook vs. Erie R. R. Co., 51 Barb., —; McCormack vs. K. C., St. Jo. & C. B. R. R., 57 Mo., 433.)

Hough, Judge, delivered the opinion of the court.

The petition in this case contained three counts. The third was abandoned at the trial and need not be further noticed. The first count claimed damages from the defendant, as the successor of the Missouri Valley Railroad Company, under and by virtue of certain statutes of the State, and alleged that said last named company without leave, and wrongfully, entered upon the lands of the plaintiff in Andrew county, Missouri, and broke up and graded, and rendered useless to the plaintiff, a strip of land one hundred feet wide and one hundred and sixty rods long, and occupied and used said strip for railroad purposes, and excluded the plaintiff from any benefit, use or enjoyment thereof, and that said unlawful entry, use and occupation has since been continued and maintained by the defendant, as the successor of said Missouri Valley Railroad Company.

The second count alleged that the said Missouri Valley Railroad Company, by negligently grading its said railroad, and making insufficient and worthless culverts, water-gaps and ditches, along the line thereof, obstructed and diverted from its natural course and channel a certain stream of water, which had never before flowed upon or flooded the plaintiff's land, and thereby caused said water to stand upon and flood about fifty acres of plaintiff's cultivated fields, and that the defendant, as the successor of said Company, has ever since maintained said railroad with its defective culverts, water-gaps and ditches, and has thereby continued to flood plaintiff's said land as aforesaid.

The defendant denied the unlawful entry and damage alleged in the first count, and averred that the Missouri Valley Railroad Company entered upon the premises in question, and constructed its said road over the said land, and that the defendant had ever since maintained the same, under and by virtue of a grant from the plaintiff to the said Missouri Valley Railroad Company, its successors and assigns, of the right of way over the same, for a width of one hundred feet, for rail-

road purposes, and not otherwise. The defendant denied all negligence and injury alleged in the second count, and relied upon the grant of the right of way, set up in its answer to the first count, and averred that all ditches, culverts and embankments constructed by the Missouri Valley Railroad Company, and maintained by the defendant, were constructed and maintained under and by virtue of said grant, and were necessary in the construction and operation of said railroad, and that the same were lawfully made in pursuance of said grant.

The plaintiff replied, denying that the defendant's road was constructed in pursuance of the alleged grant, and averred that by the terms of said grant the track of defendant's road should have been located on the line dividing sections 26 and 27, whereas it was built and being operated several rods east of said dividing line; and further denied all allegations in defendant's answer to the second count.

There was a verdict and judgment for plaintiff on both counts, and defendant has appealed to this court.

The grant of the right of way, pleaded by defendant, is as follows:

"Relinquishment of right of way. In consideration of five dollars in hand paid, I hereby release, relinquish and convey to the Missouri Valley Railroad Company, its successors and assigns, the right of way for a railroad, to a width of one hundred feet, along such line as may be located by said company across and over the tract of land situate in section 27 and section 26, Andrew county, in the State of Missouri, known as the north half of said sections, the railroad to be located on the section line dividing those two sections 26 and 27, town. 61, R. 35. As witness my hand and seal, the 22nd day of November, A. D., 1867.

WM. MUNKERS. [Seal.]

Attest, Joseph E. Kumpfall."

It is very earnestly contended on behalf of the respondent, that by the terms of this relinquishment, the Missouri Valley Railroad Company was required to construct its track immediately on and along the section line, and that failing to do

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so, said company, and the defendant as its successor, could claim no rights whatever under said relinquishment, and occupied no better position than trespassers.

It is difficult to conceive why the plaintiff should grant to the railroad company a strip of land one hundred feet in width, for railroad purposes, if the company was to be limited in the enjoyment of such grant, to a strip of the width only of its road bed, or track; and such strip to be located precisely upon the section line. One hundred feet in width having been granted for railroad purposes, the company had an undoubted right to use every portion thereof, for such purposes; and all that could be lawfully required of the company, was, that it should construct its track or tracks within the limits of the one hundred feet. The word railroad, says a leading lexicographer, should be confined to the highway in which the railway is laid, and the word, railway to the rails when laid, and this is declared to be a useful distinction. This distinction seems to have been observed in our statute in the third subdivision of the second section, relating to railroad corporations, where power is given to every such corporation to lay out its road not exceeding one hundred feet in width. We all know, however, that in common parlance these words are used interchangeably; but we think the only rational interpretation of this instrument is, that the strip of one hundred feet in width was to be located on the section line, and that said line and the defendant's track were both to be included in the said one hundred feet. This was doubtless the intention of the parties at the time, and if the object had been to have a track upon the section line, and nowhere else, entirely different language would have been employed.

The Circuit Court refused an instruction based upon the construction here given to the plaintiff's grant, and of its own motion, gave one to the effect that it was the duty of the Mo. Valley R. R. Co., to construct its track upon and along the section line; and in this we think the court erred. The defendant was entitled to a verdict on the first count.

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Damages were claimed, in the second count, for a diversion, by the defendant, in the manner therein stated, of a certain stream of water from its natural course and channel, whereby plaintiff's fields were flooded. There was testimony tending to show that no natural water course was interfered with by the defendant, but that the plaintiff was injured alone by surface water. If plaintiff's injuries were occasioned by flooding from surface water, and not by the diversion, by the defendant, or its predecessor, of a natural water course, then there could be no recovery on the second count. This question should have been submitted to the jury under instructions explaining the difference between surface water and a natural water course, and defining the duties and liabilities of the defendant arising from the construction and operation of its road across or along a running stream. This was not done.

The judgment will be reversed and the cause remanded; the other judges concur, except Judge Sherwood, who is absent.

John P. Johnston, Respondent, vs. Granville Morrow, Appellant

Morigage on mill, when will include machinery subsequently placed in.—By the
terms of a mortgage given on a mill to secure certain notes, it was made "a
lien on the mill and machinery in said mill till the payment of said notes,"
Held, that it would embrace machinery placed in the building after the mortgage was given and before the notes were satisfied.

Damages, excessive—Remittances in Supreme Court.—When excessive damages are given by a jury, a remittitur thereof may be entered in the Supreme Court, without sending the party back to the lower court.

Appeal from Buchanan Circuit Court.

Doniphan & Reed, for Appellant.

I. The mortgage purported to be and was treated as a chattel mortgage, and attached only to the machinery in the mill at the date of its execution, and it would have been incompetent

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for the parties to have contracted that such chattel mortgage should have applied, to after acquired machinery. (19 N. Y., 123; 2 Lans. [N. Y.], 127; 10 Metc., 481; 2 Hill. Mortg., 339, et seq.)

II. No remittitur has been filed in this court for this excess. (48 Mo., 42.)

W. H. Sherman, for Respondent.

I. Although the deed might not, as a chattel mortgage, affect personal property subsequently acquired by the mortgagor, yet the machinery being annexed as a fixture to the real estate described in the mortgage, becomes subject to that mortgage as a part of the realty. And it was not released from the lien or incumbrance of such mortgage by reason of its severance from the mill. By the severance it became personal property, and in that character was still subject to the mortgage. (Curry vs. Schmidt, 54 Mo., 516.)

WAGNER, Judge, delivered the opinion of the court.

The record shows that one Oliver Davis owned a piece of land, on which there was a saw-mill, in Doniphan county, Kansas, and that he solicited a loan of \$2,200, from the plaintiff herein.

Plaintiff refused to loan the money, being unwilling to rely on the land and mill as security, as the mill was old and had run down. Davis represented that he wanted to borrow the money for the purpose of building a new mill instead of the old one, whereupon, the plaintiff agreed to loan the money when the new mill was completed. When the new mill was erected the money was loaned, Davis and wife executing to the plaintiff a mortgage on the land to secure the payment, which mortgage contained this stipulation: "This instrument is to be a mortgage and lien on all buildings, mill and machinery in said mill, until said notes are paid, and to this end this instrument is to be and remain, also, a chattel mortgage on the mill and all machinery within, until said notes are fully paid."

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Both prior and subsequent to the date of the mortgage, Davis added new machinery to the mill, and, also, put new machinery in the place of old machinery which was inconvenient, out of repair, or worn out. The machinery was affixed to the mill in the usual manner, and used for improving it. The mill was situated on the bank of the Missouri river, and after the notes became due, and whilst they remained unpaid, the river commenced rising and threatened to wash the mill away. Davis informed plaintiff that he could not pay off the mortgage debt, and that he had done all he could to save the mill, and requested plaintiff to take the mill and machinery and save what he could, and make the most of it. Plaintiff then removed the mill and machinery to a place of safety at his own expense. While the several parts of the mill and machinery were lying at the place where they were deposited, Davis, without the knowledge or consent of plaintiff, took and carried away a portion of the machinery, which was severed from the mill, and delivered it to the defendant. To recover it, this suit was brought.

The machinery which was taken and delivered to the defendant, was machinery which was put in the mill, by Davis. after the execution of the mortgage, but which was delivered to plaintiff as part of the mortgaged property.

That Davis delivered the mill and all the machinery to plaintiff, is conclusively established; for this question was directly submitted to the jury under an instruction, and they found in the affirmative.

The only question is whether the after acquired machinery which was placed in the mill, was subjected to the lien of the mortgage.

By the terms of the mortgage, a lien was created on buildings, mill and all machinery in said mill, until the notes were fully paid. The mortgage, it is true, is somewhat indefinite. It does not, in words, limit the lien to the machinery then in the mill, nor does it mention machinery to be afterwards put in the mill; but it constituted a lien on all the machinery in the mill till the payment of the notes. The parties could

hardly have contemplated that the machinery would always remain the same as it was when the mortgage was executed.

In a mill, machinery is constantly breaking and wearing out and has to be replaced by new, and it is sometimes necessary to introduce additional machinery for convenience and profit. As the lien extended to the mill and all machinery within, until the notes were fully paid, it was sufficiently comprehensive to include all the machinery in the mill when the notes became due. But if we concede that there might be some doubt about this construction, it is obviated and made perfeetly clear by the action of the parties themselves. Davis turned over the mill and all the machinery in it to the plaintiff, and told him to take it, that it was his under the mortgage; and the plaintiff did take it into his possession and expended money upon it. There was no reservation of any of this machinery. This shows the intention of the parties, and what they meant by the agreement. It is the mutual interpretation by themselves of their own contract, and as there is nothing in it, which is in conflict with the writing, the intention as manifested by their own action should prevail.

The jury not only found the value of the property, but gave damages in excess of interest on the amount, and the plaintiff offers to enter a *remittitur* in this court for the excess. Upon his doing so the judgment will be affirmed; all the judges concur.

SMITH TURNER AND LUTHER T. COLLIER, Respondents, vs. Joseph Babb and George W. Dorman, Appellants.

Equitable liens—Filing notice of lis pendens affects purchaser of land.—The
purchaser of land, after the filing of notice of a lawsuit affecting the title
thereof, acquires only the rights of a purchaser pendente lite. Under a proper
construction of the statute (Wagn. Stat., 905), the words "purchasers of incumbrances" should read "purchasers or incumbrancers."

Lis pendens—Purchaser of property, when affected by decree, etc.—A purchaser pendente lite of property actually in litigation, though for a valuable considera-

tion and without notice, express or implied in point of fact, will be bound by the decree affecting that property, which may be made against the person from whom he derives title.

2. Lis pendens—Purchaser with notice affected although relief granted is not prayed for.—A. brought suit to divest the title to a tract of land out of B. & C., and to vest the same in himself; but the decree of court vested the title in B., at the same time, however, giving judgment for a certain sum, and ordering a special execution against the land to satisfy it. Held, that a purchaser at the sheriff's sale would hold the title as against a grantee of B. with statutory notice of the litigation. The fact that the decree placed a lien, not asked for by plaintiff, on the land, did not invest B. and his grantee with the title discharged of the incumbrance. In such case, the grantee, pendente lite, is governed by the decree of the court notwithstanding that the relief granted is the result of compromise, and other than that called for by the pleadings.

Appeal from Livingston Circuit Court.

H. M. Pollard, for Appellants.

I. A lis pendens is not even a constructive notice of any other points than those which are in dispute between the parties to the action. (See Ray vs. Roe, 2 Blackf., 258; 3 Ark., 392; Newl. Cont., 506, 507; also Murray vs. Ballon, 1 Johns. Ch., 571.)

Turner & Collier, for Respondents.

I. Appellants took their deed from McHolland with full notice, and are barred by the record and proceedings in the cause of Conger vs. McHolland. (See Wagn. Stat., ch. 88, § 1; Jones vs. Talbott, 9 Mo., 121; O'Reilly vs. Nicholson, 45 Mo., 166; Murray vs. Ballon, 1 Johns. Ch., 573; Harrington vs. Slade, 22 Barb., 166; Stern vs. O'Connell, 35 N. Y., 104; Hopkins vs. McLaren, 4 Cow., 678; Murray vs. Lilburn, 2 Johns. Ch., 441; Sears vs. Hyer, 1 Page, ch. 483; French vs. Shotwell, 5 Johns. Ch., 554; 2 Washb. Real Pr., 229; Freem. Judgm., 160. et seq., and authorities there cited.

Hovgu, Judge, delivered the opinion of the court.

This was an action of ejectment brought by the plaintiffs, Turner and Collier, in the Livingston Circuit Court, on the 18th day of July, 1873, against Joseph Babb, to recover the

possession of lot 5, block 22, in the town of Wheeling, county of Livingston, to which action George W. Dorman, under whom defendant, Babb, had possession, was, on motion, made a party defendant.

The petition was in the usual form, and the defendants pleaded the general issue. The cause was tried by the court

without a jury.

It appears from the record, that in December, 1869, one Crayton H. Conger instituted a suit in the Common Pleas Court of Livingston county, against George Tiffany and David A. McHolland, for the purpose of vesting in said Conger the title to lot 5, block 22, in said town of Wheeling, which he alleged had been fraudulently conveyed to the defendant, McHolland, and was held by him in secret trust for the defendant, Tiffany, whose interest in the same, Conger had purchased at execution sale.

To this petition McHolland and Tiffany, on the 19th day of January, 1870, filed separate answers.

Afterwards, on the 20th day of December, 1869, said Conger instituted another suit in said Common Pleas Court, to which said McHolland and Tiffany were made parties defendant, together with one Josiah Hunt, for the purpose of vesting in said Conger, the title to lots 1 and 2, in block 9, in said town of Wheeling, which title Conger alleged, in his petition, was still in Hunt, though said Tiffany was in reality the owner of said lots, by means of a purchase made by McHolland for his benefit, and of which he was entitled to a conveyance, upon the payment of a balance, which Conger brought into court, to be paid over to said Hunt. Conger averred in his petition, that he had purchased all the right and interest of Tiffany to said lots, at execution sale. The only answer, shown by the record to have been made to this suit, was the separate answer of the defendant, McHolland, which was filed on the 24th day of January, 1870. The foregoing pleadings were read in evidence by the plaintiffs.

The following notice, shown, by the certificate of the recorder of deeds of Livingston county, to have been filed for

record, on the 20th day of December, 1869, and recorded on the 27th day of December, 1869, was also read in evidence by the plaintiffs.

Crayton Conger, Plaintiff,
vs.
George Tiffany and
David A. McHolland, Defendants.

In the Common Pleas Court of Livingston County, Mo. Jan. Term, 1869 (1870).

To whom it may concern: Take notice that the above entitled cause is pending in the Common Pleas Court of Livingston county, Missouri, wherein Crayton H. Conger is plaintiff and George Tiffany and David A. McHolland are defendants, and said cause is returnable to the January term, A. D., 1870, of said court, and the following described real estate, situate in said county of Livingston, and State of Missouri, to-wit: Lot five (5), in block twenty-two (22), in the town of Wheeling, is liable to be affected thereby.

Signed

Crayton H. Conger, Plaintiff. By Att'y, L. T. Collier.

These two suits by Conger, were transferred to the Livingston Circuit, and on the 8th day of June, 1872, the same having been compromised and settled, a decree was made in pursnance of said settlement, vesting the title to lots 1 and 2, in block 9, in the plaintiff, Conger, and the following decree was made as to lot 5. "It is therefore considered, ordered and adjudged, that the title of plaintiff to lot No. 5, in block 22, in the town of Wheeling, Livingston county, Missouri, be vested in defendant, David A. McHolland, pursuant to said agreement, and that the plaintiff herein have and recover vs. said Holland, out of said property, the sum of one hundred dollars, the amount to be paid to Luther T. Collier and Smith Turner, his attorneys, and the costs of this suit, together with the costs in the other suit pending in this court in favor of said plaintiff and against George Tiffany and David A. McHolland, to be levied by special execution against said property, in default of the payment of the same, at the expiration of 90 days from this date, and pursuant to said agreement.

The foregoing agreement and decree were read in evidence. Plaintiffs then introduced a deed to them, for the lot in question, executed by the sheriff of Livingston county, duly acknowledged by him on the 11th day of June, 1873, which deed recited a sale of said lot to plaintiffs, regularly made on the 7th day of February, 1873, under a special execution, dated the 20th day of December, 1872, and issued under the foregoing decree. Plaintiffs introduced testimony as to the value of the rents and profits and rested.

Defendants then offered in evidence a warranty deed, to the defendant, Dorman, for said lot 5, from D. A. McHolland and wife bearing date the 1st day of February, 1870, which was acknowledged on the same day, and filed for record on the 2nd day of February, 1870, to the admission of which plaintiffs objected, for the reason that it bore date subsequent to the commencement of the suit of Conger vs. Tiffany and McHolland, and after the notice of lis pendens was filed. The court rejected the testimony and the defendants excepted. This was all the testimony introduced or offered, and the court, at the instance of the plaintiffs, declared the law as follows: "If the court finds from the evidence, that Mc-Holland made the deed to Dorman after the commencement of the suit of Conger vs. McHolland, for title to the property in question; and after due notice had been given and filed for record, in the recorder's office, of Livingston county, in which the property is situate, of the pendency of said suit for the recovery of the title thereto, then the said deed from McHolland to Dorman was taken by said Dorman with notice, and does not operate to pass the title to said property as against the plaintiff, holding said property under and by virtue of a sheriff's deed, founded upon a judgment rendered in said case of Conger vs. McHolland."

No instructions were asked by the defendants. There was a finding and judgment for the plaintiffs, and the defendants have brought the case here by appeal.

The instruction given for the plaintiffs was wholly inapplicable to the case made. The deed to which it refers was not

in evidence. The finding of the court, however, was right, on the testimony admitted, and must be sustained, unless there was error in excluding the deed from McHolland to Dorman, offered in evidence by the defendants.

There can be no question as to the service of process in this case, or as to the time of the appearance of the defendant, McHolland, to the suit of Conger. The notice read in evidence, charged the appellant with notice of the litigation affecting the title to the lot, from the date it was filed for record, regardless of the service of the process, or the appearance of McHolland in that suit, prior to the conveyance by him to appellant. The language of the statute as to the parties to be affected by such notices (Gen. Stat., 1865, p. 770) is "purchasers of incumbrances;" but that the legislature intended the language to be "purchasers or incumbrancers" is manifest from the language actually used in the enrolled bill, which is "purchasers or encumbrances." The appellant, therefore, by buying the property after the date of the filing of the notice, acquired only the rights of a purchaser pendente lite.

It is unnecessary to cite authorities to sustain the general doctrine, that a purchaser *pendente lite*, of property actually in litigation, though for a valuable consideration, and without notice express, or implied, in point of fact, will be bound by the decree affecting that property, which may be made against the person from whom he derives title.

But it is contended, by the counsel for the appellant, that such purchaser is chargeable with notice only of the matters shown by the pleadings to be in dispute between the parties, and is not bound by any possible decree that may be made affecting the property in litigation; and that as the suit of Conger was for the purpose of divesting the defendants of all title to lot 5 and vesting it in himself, the moment the title was vested by the decree in the defendant, McHolland, the defendant in this action was invested therewith, under McHolland's warranty deed, discharged of the lien placed upon it, by the decree in that suit, as no such incumbrance was

sought to be established or enforced, by the plaintiff in the case.

In support of this position, counsel cite the case of Ray vs. Roe (2 Blackf., 258). It appears in that case, that the judge of the trial court, instructed the jury, that a transfer of property, made by a defendant, during the pendency of an action of slander against him and before the rendition of judgment, was of itself fraudulent, unless made in performance of a prior contract, or in payment of a precedent bona fide debt; that all purchasers are bound to take notice of the pendency of such suit, and that such transfer was fraudulent in law, unless there was other property sufficient to satisfy the judgment. In disapproving that charge, Scott, J., delivering the opinion of the court, says: "The pendency of an action is constructive notice of the matter involved in that suit, and a purchaser of this property, which is the immediate object of the pending action, will be affected by it as a purchaser with notice. But a lis pendens is not even constructive notice of any other points than those which are in dispute between the parties to such action;" (citing 3 Atk., 392; Newl. Con., 506, 507.) Neither of the authorities cited are accessible to us here, but from references made to the case of Worsley vs. the Earl of Scarsborough (3 Atk., 392) in some of the authorities which we have examined, we are able to gather that the litigation was in equity, as to the right to certain money secured upon an estate, but not about the estate itself, and a purchaser of the estate, pending that suit, was held not to be affected by the result of that litigation.

In Kentucky it has been held, that where the ground for equitable relief stated in a bill was abandoned, as being untenable, and the bill was amended by setting up new equities and different and distinct grounds for relief, upon which the plaintiff prevailed, a purchaser, pending the litigation under the original petition, took subject to the result of that litigation only, and that a new lis pendens was created by the amendment, which did not relate back to the commencement of the action, so as to affect intervening rights. (Stone vs. Connelly, 1 Metc.,

Ky., 654; Jones vs. Lusk, 2 Metc. Ky., 358. See also Clarkson vs. Morgan, C. B. Monr., 441.)

In the case of Stoddard vs. Myers (8 Ohio, 203), it appears that one Britz recovered judgment against Wolf and filed a bill against him and his children, to subject a certain lot conveved by him to his children, to the satisfaction of said-judgment: but before decree, the judgment against Wolf was reversed, and when the cause was again tried, Britz again recovered judgment against Wolf, and thereafter filed a supplemental bill, alleging the recovery of the second judgment, and asked, as in the original bill, a sale of the lot for the satisfaction of the judgment. A sale was ordered, and plaintiff became the purchaser. After the filing of the original bill, and after the reversal of the judgment against Wolf, but before the filing of the supplemental bill, the property was purchased from the children by the grantor of the defendant, without any notice in fact of the claim to have the lot sold to satisfy the judgment. The court say: "The doctrine seems plain, that by the institution of a suit, the subject of litigation is placed beyond the power of the parties to it; that whilst the suit continues in court, it holds the property to respond to the final judgment or decree. This suit was instituted in 1831, was regularly continued until the final decree in 1835. The supplemental bill was engrafted in the original bill, and became identified with it. The whole was a lis pendens effeetually preventing an intermediate alienation." This case was affirmed in 10 Ohio, St., 365.

The Supreme Court of Iowa has gone much further than this, in the same direction, in the case of Ferrier vs. Buzick, (6 Iowa, 258,) and further than this court has ever gone. (Herrington vs. Herrington, 27 Mo., 560.)

The foregoing are the most direct authorities, on the point presented, which we have been able to find; and while we incline to the opinion that the rule laid down by the Ohio courts is to be preferred to that which has been established in Kentucky, none of the cases, in our judgment, go far enough to relieve appellant of the character of a purchaser pendente lite,

and exempt his title from the operation of the decree rendered in the case of Conger vs. McHolland.

In the case of Ray vs. Roe, supra, it must be observed that the property purchased was not directly involved in the suit. There was no litigation as to it. The contract was as to other matters and the language of the opinion must be considered with reference to the facts of the case.

In the case under consideration here, there was no amended or supplemental bill. The defendant purchased after answer filed to the original bill, and the decree was rendered on the original bill. Unless the decree itself be a nullity, we do not see how the appellant can escape its operation. It is true the petition did not ask the relief which was granted. The decree was the result of a compromise, which the parties had a right to make. Conger's rights had accrued and had been asserted in court long prior to the conveyance by McHolland to the appellant; the relation of litigants in court had already been established between Conger and McHolland, and everything done by them in good faith, in the conduct, management and determination of that suit must stand. If the power to compromise in good faith, be denied to them, the power to consent to any step in the cause, or proceeding at the trial, must also be denied. The title to the lot was the subject matter of the suit. That title was vested in McHolland with a condition annexed. The same decree which gave the title, created the charge, and the title vested subject to the charge. The appellant claims that this compromise decree should be held as to him to be good only in part. He asks that it shall be held valid to give McHolland the title; but invalid as to the condition on which he received the title.

We cannot separate them. To do so, would work a fraud and an injury. The compromise decree is good as between the parties, and the appellant here must look to his covenants.

The doctrine of *lis pendens*, is not upheld so much on the grounds of the publicity of legal proceedings, and a legal presumption of notice, arising from a supposition that people are attentive to what passes in courts of justice, as has been some-

times stated, as it is, upon grounds of public policy and general convenience. Nor can it be claimed to be an equitable rule merely. Its existence and maintenance are necessary to any effectual administration of the law. Judge Richardson says, in Herrington vs. Herrington, (27 Mo., 560,) "The policy on which the doctrine of lis pendens is founded, is to give full effect to the judgment which might be rendered in the suit depending at the time of purchase."

Sir William Grant said in the case of the Bishop of Winchester vs. Paine, 11 Vesey, Jr.: "The litigating parties are exempted from taking any notice of a title so acquired, as to them it is as if no such title existed. Otherwise suits would be indeterminable; or—which would be the same in effect—it would be in the pleasure of one party, at what period the suit should be determined." (See also O'Reilly vs. Nicholson, 45 Mo., 160.)

Conger and McHolland were at perfect liberty to dispose of their suit, regardless of the conveyance made by the latter. If the compromise and decree were fraudulent as to the appellant, he could have doubtless found relief in a proper proceeding at the proper time. But there is no intimation of any such thing.

The Circuit Court committed no error in excluding the deed, and the judgment will accordingly be affirmed; all the judges concur.

Benjamin F. Jones, Defendant in Error, vs. Richard Hart, Plaintiff in Error.

1. Attachment—Appearance of defendant—Special judgment against attached properly, when erroneous—Amendment of, at subsequent term, for irregularity, etc.—What will be ordered by the Supreme Court.—Where defendant in a sunt by attachment appears to the action, a special judgment condemning the attached property to be sold, is erroneous; as defendant may have other property with which to satisfy the judgment, and would then have a right to elect what property shall be sold. (Kritzer vs. Smith, 21 Mo., 296.) But presumptively such judgment is that of the court and not an error of the clerk and it

cannot be set aside, at a subsequent term, on the ground of clerical mistake where nothing in the record or the judge's docket, or clerk's minutes, or papers on file, shows such mistake; nor can such judgment be set aside for irregularity or informality. (What constitutes irregularity in judgments, considered.) But where such judgment is brought before the Supreme Court, that tribunal will enter up a general judgment in accordance with the statute (see Wagn. Stat., p. 188, § 36; p. 189, § 40), or remand the cause to the Circuit Court, with directions to do the same thing.

2. Judgment cannot be expunged at subsequent term for lack of docket entries, etc., to prove its rendition.—A judgment cannot be expunged at a term subsequent to that of its rendition, on the ground that neither the judge's docket nor the clerk's minutes show the rendition thereof. In such case the record of the judgment imports absolute verity and cannot be assailed for the lack of such youthers.

PER SHERWOOD, J., dissenting.

3. Attachment—Appearance—Special judgment—Error, presumptively that of clerk—Correction may be made on verdict and files—Erroneous judgment, amendment of under statute of jeofails—Entry nunc pro tunc not revisable, when.—In an attachment cause, where the defendant is served with process or appears to the action,

1st. A general judgment follows the verdict for the plaintiff as a legal conclusion; and if by reason of clerical mistake, such judgment is not entered, but the clerk, by mistake, enters instead thereof, a special judgment, the facts by which the proper amendatory entry can be made, are furnished by the verdict and files in the cause; and such entry may be directed by the court at a subsequent term. And when there is doubt as to whether the improper entry was, in fact, made by the clerk or the court, the presumption will be that the judgment was correctly rendered on the verdict, and incorrectly entered. 2nd. But even where the judgment itself is apparently erroneous, if the amendment is not "against the right and justice of the matters in suit" (Wagn. Stat., 1037, § 20), the court possesses the power under the statute of jeofails (see Wagn. Stat., 1034-5, & 6; 1036, § 19; 1037, § 20), to amend it at a subsequent term. And such amendatory judgment should not work a reversal unless "error" was thereby committed "materially affecting the merits;" (Wagn. Stat., 1067, § 33.) And the fact that the amendment is not such "error" is conclusively shown by a mandate from the Supreme upon Circuit Court to make the same amendment-Srd. And, in any event, where the appeal is taken from the judgment entered nune pro tune, and not from the judgment originally entered, the one last named cannot be revised in the Supreme Court.

Error to DeKalb Circuit Court.

M. A. Low, for Plaintiff in Error.

I. The judgment, as originally entered, was erroneous, (Kritzer vs. Smith, 21 Mo., 296.)

II. The minutes of the court do not show that any judgment was ever ordered on the verdict.

III. The failure of a court to act, or its incorrect action, can never authorize a nunc pro tunc entry. If no judgment is rendered, or if an imperfect one is rendered, the court has no power to remedy any of these errors or omissions by treating them as clerical misprisions.

In all cases in which such an entry can be made, the record must show the facts authorizing it; and this power should be exercised with great caution. (Hyde vs. Curling, 10 Mo., 359; Gibson vs. Chouteau, 50 Mo., 85; Groner vs. Smith, 49 Mo., 318; Gray vs. Brignadello, 1 Wall., 627; State vs. Fields, Peck [Tenn.], 140; Powell vs. Commonwealth, 11 Gratt., 822.)

Such entries cannot be made from outside evidence or from facts existing alone in the breast of the court, after the end of the term at which final judgment was ordered. (Saxton vs. Smith, 50 Mo., 490; State vs. Smith, 1 Nott & M., [S. C.] 16.)

A general judgment cannot be amended nunc pro tunc at a succeeding term, so as to make it a special judgment; and hence a special judgment cannot be amended so as to make it general. (Green vs. Dodge, 3 Ohio, 486; see Pockman vs. Meatt, 49 Mo., 345.)

In this case the evidence on which the amendment was made is saved by the bill of exceptions, and there is nothing appearing of record to warrant the amendment. The court must have made it either without evidence, or from matters wholly within the breast of the court.

Wm. Henry, with Strongs & Hedenberg, for Defendant in Error.

I. To affirm the case the respondent relies upon the law as often declared by this court, and the uniform usage of the courts of record in this State. (DeKalb Co. vs. Hixon, 44 Mo., 341; Gibson vs. Chouteau's Heirs, 45 Mo., 171; Massey vs. Scott, 49 Mo., 278; Horstkotte vs. Menier, 50 Mo., 158; Mann vs. Schroer, 50 Mo., 306; Priest vs. McMaster, 52 Mo., 60; Jones vs. St. Joseph Fire & Mar. Ins. Co., 55 Mo., 342.)

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II. In making the nunc pro tunc entry the court found the facts, and the whole matter having been before that court, this court will not disturb its finding.

Hough, Judge, delivered the opinion of the court.

At the October term, 1873, of the DeKalb Circuit Court, in an action by attachment, to which the defendant appeared, a verdict was rendered in favor of plaintiff, and against the defendant, for the sum of four thousand six hundred and thirty-four dollars and ninety one cents, on which verdict a judgment was entered of record, for the recovery of said sum, and directing the property attached to be sold; and if it should be found insufficient to satisfy the judgment, then directing a levy to be made upon other property of the defendant.

At the April term, 1874, the defendant filed a motion asking the court to correct the record, by expunging and setting aside the entry of final judgment entered on the judgment record, and for the reason that said final judgment of recovery in favor of plaintiff, and against defendant, was entered by the clerk without authority—no such judgment having been given by the court in said cause, as appears from the minutes of the court; 2nd, because the minutes of the court from which said judgment was made up, were insufficient to support said judgment, or any judgment against this defendant.

On the succeeding day the plaintiff filed the following motion:

"Comes now the plaintiff and shows to the court that in the entry of the judgment in the cause, at the October term, 1873, the clerk of this court, without authority of the court, and without authority of law, entered in said judgment the following words at or near the end of his judgment entry 'and if the same shall not be sufficient, then the remainder shall be levied of the remaining real estate or goods and chattels of the defendant, and that execution issue in accordance with the terms of this decree;' and plaintiff further shows that at said term, the order of this court upon the rendition of the verdict of the jury was that the judgment of the court be a

general judgment for the amount of said verdict, and a general execution thereon, as provided by law; that said clerk failed to enter said order for execution on his record of his judgment; wherefore plaintiff asks the court to order the clerk of this court, now for then, to enter the proper judgment and order for execution, as ordered by the court aforesaid, and order for sale of attached property, as by the order of the court and the law provided."

The two motions were, by consent, heard together, and the only evidence introduced, or offered, by either of the parties, was the entry made by the clerk in his minutes, together with the entry made by the judge in his docket, at the time of the rendition of the verdict.

The clerk's entry, after entering the cause, was "jury return their verdict for plaintiff and assess his damages at \$4,634.91." The entry made by the judge was "sub. to jury and verdict for \$4,634.91." Whereupon the court overruled the defendant's motion and sustained that of the plaintiff, and directed the clerk to enter of record, as of the October term, 1873, a general judgment as provided by law in such cases, to which rulings and action of the court, the defendant excepted and now brings the case here by writ of error.

It is quite clear that as the defendant appeared to the action, the original judgment in this case condemning the attached property to be sold was erroneous. Such was the decision of this court as to a similar judgment in the case of Kritzer vs. Smith, 21 Mo., 296, Scott, J., delivering the opinion of the court.

Nothing appears in the record which would warrant us in pronouncing it to be a mere clerical mistake, and subject to correction as such. Judgments are presumed to be rendered by the court and cannot be considered to be merely the act of the clerk, and all errors therein to be his misprisions. If it appeared from the record, the judge's docket, or the clerk's minutes, or any paper on file connected with the cause, that the court had rendered a general judgment and the clerk had entered up the judgment awarding special execution, now

sought to be expunged by one party, and to be corrected, by the other, the action of the court in directing a nunc pro tunc entry, would be sustained; but it has been expressly decided by this court that such entries cannot be made "from outside evidence, or from facts existing alone in the breast of the judge, after the end of the term at which the final judgment was rendered." (Saxton vs. Smith, 50 Mo., 490; Pockman vs. Meatt, 49 Mo., 348; Dunn vs. Raley, 58 Mo., 134; Fletcher vs. Coombs, 58 Mo., 430.) The court erred, therefore, in directing the entry of a general judgment, nunc pro tunc.

On the other hand we are of opinion, that the motion of the defendant to expunge the judgment, on the ground that there was no entry in the judge's docket, or in the clerk's minutes, showing that such a judgment, or that any judgment had been rendered, was properly overruled. The judgment was of record, the term had passed, and the record imported absolute verity and could not be assailed in that manner. It needed no such vouchers for its authenticity as docket entries and clerk's minutes. These might be sufficient to authorize the court to enter up a judgment which was really rendered, but had no record existence; but their absence cannot destroy the verity of a judgment, which is of record. Such a doctrine would imperil the existence and authority of all judicial records.

We have attentively considered, whether the action of the Circuit Court may not be upheld, by regarding the original judgment as having been set aside for irregularity, and the nunc pro tunc entry as an entry of judgment on the verdict. But an insuperable obstacle to this view of the case is, that the original judgment cannot be held to have been irregular. It was regularly rendered after the verdict, in strict accordance with the rules of law and the practice of the courts, and is wholly unobjectionable, except as to the relief afforded.

"An irregularity may be defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an

nuseasonable time, or improper manner. * * A judgment by default is irregular when the defendant, in an action not bailable, has not been served with a copy of process, or there has been no declaration regularly delivered or filed, and notice thereof given to defendant; or when it is signed before defendant's appearance, or without entering a rule to plead, or demanding a plea when necessary; before the time for pleading has expired, or after a plea has been regularly delivered or filed." (Tidd's Prac., 512, 513.) We are not aware of any case where a judgment, such as that under consideration, has been held to be merely irregular. (Stacker vs. Cooper Circuit Court, 25 Mo., 401; Doan vs. Holly, 27 Mo., 256; Moss vs. Booth, 34 Mo. 318; Lawther vs. Agee, Id., 372; Harkness vs. Austin, 36 Mo., 47; Downing vs. Still, 43 Mo., 309.) Nor can this judgment be considered as simply informal. It errs in matter of substance; it gives rights and takes away rights, by its terms, not warranted by law, and is therefore erroneous. Being subject to review only for error, therefore, were we to stop here, it would be left in full force, under circumstances which might deprive the party interested, of all future relief. The defendant is entitled to elect what property shall be first sold, and we cannot deprive him of that right. The entire record has been brought here, though in a much abbreviated form, by the present writ of error, and it appearing therefrom that the original judgment is manifestly erroneous, we might, as was done in Kritzer vs. Smith (21 Mo., 296), enter the proper judgment in this court; but we are of opinion that the original judgment, and the judgment nunc pro tune, should be reversed, and that the cause be remanded, with directions to the Circuit Court to enter up a general judgment on the verdict, in accordance with the statute. We have thus directed to be done, only what the Circuit Court had in effect already done; but, to preserve the integrity of judgments, the restrictions imposed by law as to their vacation, or modification, after the term has lapsed at which they were rendered, must be strictly upheld; and we cannot sanction the unlawful exercise of powers by the Circuit Courts, which belong alone to this court.

All the judges concur, except Judge Sherwood, who dissents.

PER SHERWOOD, Judge, dissenting.

I have been unable to concur in the above opinion and will briefly give the reasons which have induced my dissent.

The inherent power of a court of record to correct the mistakes of its clerk, by amending the record, in accordance with the facts patent of record, has never before been called in question. It is a doctrine of universal recognition. In Short vs. Coffin, Extr., 5 Burr, 2730, it was held by Lord Mansfield, that a judgment against an executor de bonis propriis should be so amended as to become one de bonis testatoris, and this, even after error brought and error assigned, and in nullo est erratum joined. So, also, in Rees vs. Morgan (9 T. Rep., 350), an action of replevin, the defendant had a verdict, but the judgment rendered was not in conformity thereto, in that it failed to award to him a return of the property, and yet after error, the judgment was amended in the particular referred to, and the reason given by the court in each of the instances cited, was, that the judgment as amended, "was the necessary consequence of the finding of the jury."

The verdict of the jury, in those cases I have noted, was the sole basis of the amendments desired and made; and it does not seem to have occurred to the learned judges who there presided, that they were doing an unwarrantable or unprecedented act in refusing to treat a mere clerical misprision as the error of the court, notwithstanding that the judgment as entered in the one instance, gave execution against the property of the executor, instead of against that of the testator, and refused in the other, to award a return of the property found by the jury to be that of the defendant. It is a fixed principle, that a judgment de bonis propriis will not lie against an executor in a first suit, and that the legal judgment for a defendant in replevin is one of returno habendo; and it was upon that precise principle that the above cited cases proceeded, when amending the judgments in conformity with the verdicts and it was applied to the property of the executor of the property for the executor of the property found by the judgment of returno habendo; and it was upon that precise principle that the above cited cases proceeded, when amending the judgments in conformity with the verdicts and it was approximated as a property of the property of the property of the second of the property of the property of the second of the property of the second of the property of the property

dicts, and in accordance with the operation of law.

And I claim the application of a like principle to the case at bar.

Upon the rendition of a verdict for the plaintiff, in an attachment cause, where the defendant is served, or appears, a general judgment follows the verdict, as a legal conclusion; (Wagn. Stat., 189, § 40) and if by reason of clerical mistake, such judgment is not entered, the facts by which the proper amendatory entry can be made, are furnished by the verdict and files in the cause, just as in the present case, and this is amply sufficient for that purpose, or else all our decisions hitherto made, are at fault. (Hanley vs. Dewes, 1 Mo., 16; Hickman vs. Barnes, Id., 156; Hyde vs. Curling, 10 Mo., 359; State vs. Clark, 18 Mo., 432; DeKalb Co. vs. Hixon, 44 Mo., 341; Gibson vs. Chouteau's Heirs, 45 Mo., 171; Massey vs. Scott, 49 Mo., 278; Groner vs. Smith, Id., 318; Benoist, Ex'r, vs. Christy, 50 Mo., 145; Priest, Adm'r, vs. McMaster, Adm'r, 52 Mo., 60; Jillett vs. Union Nat. Bk., 56 Mo., 304.)

I will now briefly notice some of the more prominent of these cases.

In Gibson vs. Chouteau's Heirs, (45 Mo.,) Wagner, Judge, said:

"Where the clerk fails to enter judgment, or enters up the wrong judgment, there is no doubt about the existence of power in the court to correct the matter, and order the proper entries to be made at any time."

In Massey vs. Scott, (49 Mo.,) the judgment in question was a general one, rendered in an attachment cause, where the defendant was notified by publication, and did not appear, and yet Judge Adams did not, in delivering the unanimous opinion of the court, at all hesitate in declaring: "This judgment, though informal, was still a valid judgment until set aside or reversed, and it is such a judgment as the court would at any reasonable time correct by an entry nunc pro tune."

Now, if a general judgment, rendered upon constructive notice in an attachment proceeding, may be amended to a special one, does it not follow, with conclusiveness, that the converse of this proposition must also be true?

It has long been held in this State, that the classification of a demand has the force and effect of a judgment. In Jillett vs. Union National Bank, *supra*, in indorsing a memorandum on the claims, the Probate Judge made an endorsement on them, by which they were assigned to the 5th, instead of to their proper, the 6th, class; and the clerk, misled by such memoranda, conformed his record entries thereto.

This court, however, unanimously held, that the necessary correction could be made by an appropriate entry, whereby the *class* could be *changed*, long after the term had passed.

And in that case it is note-worthy that the only datum for such amendment was, it appeared on the face of the claims, that by operation of law, they should have been placed in the 6th and not in the 5th class of demands.

And this ruling was made, notwithstanding that the case of Miller vs. Janney's Ex'r (15 Mo., 265), was expressly urged upon our attention, where it was held that a court could not. at a subsequent term, change the class to which a demand had been assigned. And our decisions on the point involved here, except the one under discussion, are in full accord with the rulings of courts elsewhere. (Balch vs. Shaw, 7 Cush., 282; Allen vs. Bradford, 3 Ala., 281; Glass vs. Glass, 24 Id.. 468; Frink vs. Frink, 43 N. H., 508; Usher vs. Dansev, 4 M. & S., 94; Atkins vs. Sawyer, 1 Pick., 351; Hall vs. Williams, 1 Fairf., 278; Close vs. Gillespey, 3 Johns., 526; Waldo vs. Spencer, 4 Conn., 71.) The case of Kritzer vs. Smith (21 Mo., 296), is by no means in point here, for there, no question was raised or doubt entertained but that it was the act of the court which resulted in a special, when it should have been a general judgment; nor was there any motion made for the correction of the entry complained of.

Here the very point in dispute is, whether the judgment as engressed, was the act of the court or the unauthorized act of the clerk.

In such a case, if our former rulings are of any binding force, every presumption must favor and attend the judgment of the court below. (Stewart vs. Small, 5 Mo., 525; Yaughan

vs. Montgomery, Id., 529; Small vs. Hempstead, 7 Mo., 373; Walter vs. Catheart, 18 Mo., 256; State vs. Rogers, 36 Mo., 138.)

And, therefore, it ought to be presumed, that the court gave the proper judgment on the verdict, and that it was the clerk's mistake which caused the informal entry. But I confidently maintain that under the extremely liberal statute of jeofails, Wagn. Stat. (1034-5-6-7, §§ 6, 19, 20), a court possesses the power to amend at a subsequent term, even an apparently erroneous judgment; for § 6, supra, provides: "That after final judgment rendered in any cause, the court may, in furtherance of justice, and on such terms as may be just, amend, in affirmance of said judgment, any record, pleading, process, entries, returns, or other proceedings in such cause, by adding or striking out the name of a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by rectifying defects or imperfections in matters of form, and such judgments shall not be reversed, or annulled therefor."

And § 19, supra, makes ample provision for the amendment of mistakes and misprisions of the clerk, of almost every conceivable character, and especially in respect to "any informality in entering a judgment or making up the record thereof."

And § 20, supra, as if to "make certainty doubly sure," provides: "The omissions, imperfections, defects and variances in the preceding section enumerated, and all others of a like nature, not being against the right and justice of the matter in suit, and not altering the issues between the parties on the trial, shall be supplied and amended by the court where the judgment shall be given, or by the court into which such judgment shall be removed by writ of error or appeal."

It must be obvious in the case before us, that the amendment made by the court below did not, and could not, alter the issues between the parties on the trial; and it is equally obvious, that it was not "against the-right and justice of the matter in suit." Jones v. Hart, et al.

Again, this court is expressly inhibited, by § 33, p. 1067 of the Practice Act, from reversing "the judgment of any court unless it shall believe that error was committed by said court, against the appellant or plaintiff in error, and materially affecting the merits of the action.

That no such error was, in the estimation of this court, committed, is palpably and conclusively apparent from the fact that while the judgment entered nunc pro tune by the trial court is reversed, the mandate goes that that court shall re-enter the same judgment.

But aside from the foregoing remarks, a barrier, altogether insuperable to any consideration of the correctness of the judgment as *first entered*, is presented in the fact that no appeal was taken from that judgment, and consequently, it was incapable of revision here.

Viewed, then, in any light, I cannot yield assent to the conclusion reached by my associates.

I am for affirming the judgment.

Benjamin F. Jones, Respondent, vs. Richard Hart and Richard J. House, Appellants.

1. Execution sale—Erroneous judgment—Title—Right of defendant.—While all rights which have been acquired, bona fide, by any third person, under an execution issued under a judgment, when the execution has not been impugned as improper or invalid, will be respected and preserved; yet if the judgment be set aside or reversed, the defendant is entitled to his property, seized under such execution, if in the hands of the plaintiff or the sheriff, or to the proceeds of the sale if it had been sold to any other person; and this principle would reach any right acquired by the plaintiff by motion against the defendant on a delivery bond.

Appeal from De Kalb Circuit Court.

M. A. Low, for Appellants.

William Henry, with Strongs & Hedenburg, for Respondent.

Jones v. Hart, et al.

Hough, Judge, delivered the opinion of the court.

This is an appeal from a judgment rendered by the Circuit Court of DeKalb county, on motion, against the defendant, Hart, as principal, and the defendant House, as surety, on a delivery bond given by them to the sheriff of Caldwell county, for the delivery of certain personal property, levied upon by said sheriff as the property of Hart, under an execution issued from the Circuit Court of DeKalb county, on a judgment rendered in said court against said Hart, in favor of the plaintiff Jones.

The judgment was rendered at the October Term, 1873, for the sum of \$4,634.91, and directed that certain real property, attached in the cause, should be sold to satisfy said judgment; and if it should prove insufficient, that the residue of the judgment should be levied of the remaining real estate, goods and chattels of the defendant. On this judgment a general execution was issued, directed to the sheriff of Caldwell county, which was by the sheriff levied on certain real estate, and also on several horses and cows, for which latter he took a delivery bond, as provided by law, signed by the defendant Hart, as principal, and the defendant House, as surety. The sheriff in his return shows, that the defendant failed to return said property on the day appointed, or at any other time, and that he made sale of the real estate for a sum which was insufficient to satisfy the execution. At the April term, 1874, to which said execution was returnable, the defendant Hart moved to quash the execution, for the reason that it was a general one and did not follow the judgment, and for the further reason that a special execution, in pursuance of the judgment, had been issued, directed to the sheriff of DeKalb county, under which the real property described in the judgment had been levied upon and advertised for sale, but had not then been sold.

On the same day, the defendant filed a motion to "expunge" the judgment under which the execution was issued. On the succeeding day the plaintiff filed a motion to enter a general judgment nunc pro tune, and on the day following, the mo-

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tion to "expunge" the judgment was overruled and the motion for the entry nunc pro tunc was sustained and a general judgment directed to be entered nunc pro tunc, to all of which the defendant excepted.

The only evidence on which the entry of the general judgment was made, was a memorandum in the judge's docket, and a similar one in the clerk's docket, showing that the cause was submitted to a jury and that they returned a verdict for \$4,634.91.

Afterwards a motion, previously filed by the plaintiff, for judgment on the delivery bond, came on to be heard, and plaintiff introduced testimony as to the value of the property, and the defendant then offered in evidence a forfeited mortgage, duly acknowledged and recorded, executed by the defendant Hart before Jones recovered judgment against him to one William J. Hart of the property described in said bond, which was rejected by the court and defendants excepted. Defendants then offered to prove that subsequent to the execution of the delivery bond, and before the day appointed for its delivery, said William J. Hart, mortgagee, took the property described in the delivery bond from the possession of the defendant, which testimony was rejected and defendant excepted. Judgment was rendered for plaintiff, on the motion for \$592.

It is agreed by counsel, that the judgment under which the execution in question was issued, and the proceedings complained of were had, is the same judgment which was brought under review in the case of Jones vs. Hart, ante p. 351 at the present term, and which has been reversed by this court. While all rights which have been acquired, bona fide, by any third person, under any execution issued on this judgment, which execution has not been impugned as irregular or invalid, will be respected and preserved, the defendant, whose property has been sold, is entitled to a restitution of the fruits of the sale. (Shields vs. Powers, 29 Mo., 317.) If the property itself is in the hands of the sheriff, or has been transferred to the possession of the plaintiff, through the instrumen-

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tality of the execution, he is entitled to be restored to that. (Gott vs. Powell, 41 Mo., 420; Hann. & St. Jo. R. R. Co. vs. Brown, 43 Mo., 294.) This principle must also reach any right the plaintiff has acquired, by motion against the defendants on the delivery bond, for a failure of defendant to deliver, according to the terms of the bond, the property levied upon by the sheriff under the execution.

It is apparent, therefore, that it is immaterial whether or not error has been committed in the proceedings resulting in a judgment against the defendants on the motion of the plaintiff for a breach of the terms of the delivery bond.

The plaintiff must surrender all property and rights acquired by him under the execution, and to end all controversy on that subject as to the personal property levied upon, the judgment for the plaintiff on the motion will be reversed.

All the judges concur, except Judge Sherwood, who expresses no opinion.

JOHN RAMMELL, Respondent, vs. MERRILL OTIS, Appellant.

1. Stander—Words actionable per se—Words not, but referring to character, trade, etc.—What averments and proof necessary.—Generally, words which impute an indictable offense for which corporal punishment may be inflicted—such as a charge of larceny—are actionable per se, and in such case no special damages need be alleged or proved; but where the words are not actionable in themselves, and cannot be made so by inducement, and the ground of complaint is, that plaintiff has been injured in respect to his character and reputation, his business or occupation, he cannot recover without alleging that the words were spoken of him in relation to one of these particulars, and setting out and establishing special damages. (Curry vs. Collins, 37 Mo., 324.)

Appeal from Nodaway Circuit Court.

Dawson & Edwards, with Bennett Pike, for Appellant.

I. The words charged are not actionable per se, but only by reason of some special damage in respect to plaintiff's trade or profession, which damage should have been averred

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and proved and was not. (Curry vs. Collins, 37 Mo., 324; Sellers vs. Tell, 4 Barn. & Cr., 655.)

Johnston & Jackson, for Respondent.

I. The court did not err in the admission of evidence under the second count in the petition. Any charge of dishonesty against one in connection with his profession or business, whereby his character in his profession or business may be injuriously affected, is slanderous per se. (Fowels vs. Brown, 30 N. Y., 20; Backus vs. Richards, 5 Johns., [N. Y.] 476; Burtch vs. Nicherson, 17 John., 217; 1 Am. Lead. C., 5 ed., 114-116; 1 Stark. Sland., 134.)

WAGNER, Judge, delivered the opinion of the court.

This was an action for slander. The petition contained two counts. The first charged that the defendant accused the plaintiff of the crime of larceny, in stealing meal, flour and grain from a mill belonging to defendant and others, in which plaintiff was employed as a miller. The second count charged that the defendant accused plaintiff, in his character and profession of miller and book-keeper for the company, with keeping false and dishonest books.

The defendant admitted speaking the words, and justified by alleging their truth. On this issue the cause was tried, and there was a verdict on both counts for the plaintiff.

On the trial defendant objected to the introduction of any testimony on the second count, because the same did not state facts sufficient to constitute a cause of action; and the principal reason assigned was, that there was no allegation of special damages. The objection was overruled, and the evidence was permitted to be introduced.

There is no controversy in reference to the proceedings on the first count. The charge in that count is the crime of larceny, and that is actionable per se; and to maintain the action it is not necessary to either aver or prove any special damages. But the second count stands upon a different basis. It sets out that the plaintiff was a miller by profession,

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and the owner in part and operating a grist mill; and as such miller he had always conducted and demeaned himself with honesty, etc., and was never suspected, nor had he been guilty of making false entries or falsifying the books of account of the mill in which the business transactions of the parties were kept; yet, the defendant well knowing the premises, and maliciously intending to injure the plaintiff in his good name and credit, and in his capacity and profession as a miller, and to cause it to be believed that plaintiff was guilty of keeping false and fraudulent accounts, and of dishonest acts, in his capacity and profession of miller, in a certain discourse which he had of and concerning the plaintiff, and of and concerning his profession and trade as a miller, in the presence and hearing of divers persons, falsely and maliciously spoke and published the following false, scandalous and defamatory words, to-wit: "John Rammell (meaning plaintiff) does not keep honest books," (meaning the books of account of the transactions of plaintiff, as a miller as aforesaid) by means of the speaking of said defamatory words plaintiff was greatly injured to his damage, etc., and for which he sned.

It is a well established principle, that to maintain an action for words spoken the words must either have produced a temporal loss to the plaintiff, etc., or they must impute some matter in relation to his particular trade or vocation, which, if true, would render him unworthy of employment. Any charge of dishonesty against an individual, in connexion with his business, whereby his character in such business may be injuriously affected, is actionable. If spoken of him individually, and not in connexion with his office or business, they would not be actionable. But where the words are not actionable in themselves, and cannot be made so by any matter of inducement whereby they could be made to impute an indictable offense which would be punishable by a corporal punishment, and the ground of complaint is, that the plaintiff has been injured in respect to his character and reputation, his trade and business, or his profession or occupation, the

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action cannot be maintained without an averment that the words were spoken of the plaintiff in reference to some one of these things; and, then the words become actionable, only by reason of some special damage, which must be particularly averred and proved. (Curry vs. Collins, 37 Mo., 324, Holmes J.)

The words charged in the second count were not actionable. in themselves; they only became so by alleging that they were spoken of and concerning the plaintiff in his trade or business, and, then, before he could maintain his action, it was necessary for him to aver and prove that he was especially damaged or injured by them.

There was no allegation in the petition that the plaintiff suffered any special damage whatever, in consequence of the words spoken, and as there was no such averment, there was no proof given on the subject. The necessary ingredients, therefore, to support the count, were not made out.

We cannot see that the court committed any other error. The instructions appear to be unexceptionable. The judgment is reversed and the cause remanded. The other judges concur.

STATE OF MISSOURI, Respondent, vs. John A. Potts, et al., Appellants.

1. Recognizance to appear—Demurrer—Omission of day of the month.—The condition of a recognizance was, that the principal should "appear at the Circuit Court on the first day of the next term thereof, to be holden on the—day of June next." On scire facias on the recognizance against the sureties, held, that the omission of the day of the month was not a material defect; and that even if there were any substantial defect in the recognizance, it could not be taken advantage of by demurrer; for a demurrer to a scire facias on a forfeited recognizance is not taken as to what appears in the writ or recognizance, but as to what appears of record.

Appeal from Caldwell Circuit Court.

J. M. Hoskinson, for Appellants.

State v. Potts, et al.

Jno. A. Hockaday, Att'y Gen'l, with Crosby Johnson for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The record shows that one James Potts entered into a recognizance before a justice of the peace, with defendants as his sureties in the sum of one hundred dollars, for his appearance at the Circuit Court to answer to an indictment for petit larceny. The grand jury found and returned into court a true bill against him, but he failed to appear, and a forfeiture of his recognizance was taken. A scire facias was thereupon sued out, and the principal was not found; but the sureties, the appellants here, were served. They appeared and filed a demurrer to the record and proceedings, which was overruled and judgment absolute was rendered against them.

The demurrer deals in generalities, and ought to have been disregarded. Without stating particular facts of objection, it merely deduces or asserts conclusions of law. It is claimed that the recognizance is uncertain and indefinite, in the condition as to when the principal should appear; but this does not seem to be borne out by the instrument itself.

The condition is, that Potts shall appear at the Circuit Court on the first day of the next term thereof, to be holden on the —— day of June next. This was not a material defect. He was bound to take notice of the time the court met, and his obligation was to appear on the first day. Even had there been anything substantially defective in the recognizance, it could not have been taken advantage of by demurrer; for a demurrer to a scire facias on a forfeited recognizance is not taken as to what appears in the writ or recognizance, but to what appears of record. (State vs. Randolph, 22 Mo., 474.)

The whole proceedings, so far as we have been enabled to discover, are regular enough, and the judgment will be affirmed. The other judges concur.

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VINCENT CHAMBERS, et al., Appellants, vs. The Board of Education of the Town of Cameron, Respondent.

- 1. Contract in writing for lumber for building school house-Delivery of lumber to superintendent-Payment of instalments as work progresses-Subsequent vesting of title-Parol agreement of School Board-Written contract, how far may be varied by - Transfer of possession .- Under a written contract with a School Board, a builder agreed to furnish lumber for the erection of a school house, payment to be in instalments as the work progressed; and bond was given to secure his compliance with the contract. Afterward at a meeting of the Board, from a conversation among the members, it appeared that there was a verbal understanding that a certain sum should be advanced to the builder for the purchase of lumber, which should thereupon become the property of the Board. But no minute or record of such arrangement was preserved. The lumber was bought by the builder and placed on the school premises in charge of a superintendent appointed by the Board. For an unpaid balance of the purchase money, the vendor, took a bill of sale of part of the lumber on the premises, and brought replevin therefor. Held, that the general agreement embraced in the written contract, that the lumber should be paid for in instalments as the work progressed, and the fact that under the contract the material was placed on the premises in charge of the superintendent, especially when taken in connection with the giving of the bond, would not, on the purchase and delivery of the property, vest the title of the same in the Board. The written contract would not be held to show such intent. And the oral agreement, by the terms of which the property was to so vest, being inconsistent therewith, was inadmissible to affect the written contract.
- As to whether the builder's title to the lumber could be transferred merely by the parol agreement above referred to, so as to preclude his creditors without any visible change of possession, quare?
- School Boards—Proceedings of, how proved.—Proof of regulations, orders, etc., of School Boards, is not limited to the copies of those proceedings referred to by the statute. (Wagn. Stat., 1872, p. 1267, § 13.)
- 3. Contracts in writing—How far may be varied by subsequent parol agreement, —Written contracts may be altered by subsequent parol agreements in relation to the time of performance on matters about which the contract makes no provision.

Appeal from Clinton Circuit Court.

Wm. Henry and J. E Merryman, for Appellants.

The contract was let to Ely, and by its terms he undertook to furnish all the materials and complete the building in a specified time and manner, and for a stipulated compensation. Hence, he was not an agent or servant of the Board. (Blake

vs. Ferris, 5 N. Y., 48, 61, and cases cited; Pack vs. Mayor, &c., of New York, 8 N. Y., 222; Eaton vs. Eu. & North. R. R. Co., 59 Me., 520; Painter vs. The Mayor, &c., of Pittsburgh, 46 Penn. St., 212.)

And the rule is the same, although the contract should provide that the work was to be done under the direction and to the satisfaction of certain officers of the corporation. (Kelley v. Mayor, &c. of New York, 11 N. Y., 432; Barry vs. City of St. Louis, 17 Mo., 121.)

From the fact that Ely was not agent or servant of the Board, it follows that he might build and complete the school house by any agency, and with whatever means or material he saw fit, subject, however, to a suit for damages in case of a failure to fulfill his contract. And he might have placed upon or removed from the premises whatever material he pleased, and the title thereto would not ipso facto vest in the Board before it was worked into the building, or so attached to the premises as to become a part of the realty. (Hill Rem. Torts, p. 25; Johnson vs. Hunt, 11 Wend. 137.) And under this view of the law the appellants are the owners of the property; and the case is not changed by the private verbal understanding that Ely was to have \$3000 advanced to him to buy lumber for the building, and that the lumber was to belong to the Board, because: 1. Such an understanding would be fraudulent in fact and in law, both as to creditors and subsequent purchasers. 2. Defendant could only prove its acts by its record or by a sworn copy, or a certificate by the president and secretary, and authenticated by the seal of the Board. (Wagn. Stat., 1267, § 13.) 3. No contemporaneous verbal agreement can be allowed to contradict, vary or extend a written contract. 4. If the agreement amounted to a mortgage or pledge of the lumber, it was void, because the agreement was verbal, and the pledge or mortgaged property was never delivered to the pledgee or mortgagee.

Thomas E. Turney, with S. H. Corn, for Respondent.

I. The first instruction given at the request of defendant was properly given.

The Board of Education by reason of the inspection of the superintendent employed by the Board and the payment of his estimates to Ely, had either the absolute property in the lumber, or such an interest in it as would prevent Ely from using or dealing with it for any other purpose than the erection of the school building. (Sto. Sales, 2 ed., §§ 233-4, and 315-16; Woods vs. Russell, 5 Barn. & Ald, 942; Laidler vs. Burlinson, 2 Mees. &. W., 514-17; Clark vs. Spence, 4 Ad. & E., 448; Willk. Ship., ch. 2; Atkinson vs. Bell, 8 Barn. &. Cres., 282; Carothers vs. Payne, 5 Burg. R., 277; Oldfield vs. Love, 9 Barn. & Cres., 73-78.)

Evidence of the parol agreement was properly admitted. It did not add to, enlarge or vary any written agreement between the parties.

II. This is not a case of an innocent purchaser for value from one in possession. The defendant was in possession and plaintiff had notice of all the facts which gave title and possession to defendant.

Napton, Judge, delivered the opinion of the court.

This was an action to recover possession of some lumber alleged to belong to the plaintiffs.

The plaintiffs were lumber dealers in Muscatine, Iowa, and sold to one Ely a lot of lumber for \$3,600, for which Ely paid in each \$1,500 and was charged with the remaining \$2,100. Ely was a carpenter and builder, and purchased the lumber to be used in building a school house at Cameron, for the construction of which he was the contractor, under a written contract with the defendant, the Board of Education. The lumber was forwarded to Ely, and by him hauled from the R. R. depot and placed on a lot belonging to the School Board, where the school house was to be built. It does not appear how much of the lumber was used in the building, from the month of May, when the contract was made and the building commenced, until the month of December, 1872, when the controversy upon which this action is based arose.

It appears, however, that on the 28th of December, 1872, Ely was still indebted to the plaintiffs, on account of this lumber, in the sum of \$1,575, and one of the firm, having come down to Cameron to secure the debt, took a bill of sale from Ely for a portion of this lumber sufficient to cover the sum owing on it, had it marked or branded with the firm name, and was about to remove it, when the defendant claimed the ownership, and prevented its removal. This action was then brought by the plaintiffs.

There is very little, if any, discrepancy in the testimony, except upon one point, which relates to a verbal contract between two of the board of trustees and Ely.

There was a written contract between the Board of Trustees and Ely for the building of the school house, which was to cost about \$21,000. This contract is in the record. By this contract, which was dated May, 4, 1872, Ely was to build the school house and appurtenances described in it, and furnish all the materials and perform all the work according to certain plans referred to in the contract and under the supervision of an architect named. The house was to be completed on the 1st of November, 1872. Charges were to be allowed by the architect, etc. The board was to pay Ely \$20,789 in instalments as the work progressed, reserving ten per cent., etc., from the amount of the work done and materials delivered on the ground or in the building. These instalments were to be paid on certificate of the architect, etc. It was further provided, that for the materials used or to be used in said building, upon Ely's filing his bond for \$20,000, said bond being approved by the Board, the sums required for said materials should be paid upon the written order of the architect, and when approved by order of the Board, should be paid to Ely.

This contract was duly executed, signed by the president of the Board and Ely; and on the same day Ely executed his bond for \$20,000, as required by this contract. So far the facts were undisputed.

On the part of the defendant Th. E. Turney testified as follows: "I have been a member of the Board since its organization, and treasurer of the Board; was present at the meeting of the Board at which Mr. Ely made application for an advance of money to buy lumber. It was the meeting at which his contract to erect the building was signed and bond filed. He requested the Board to advance him \$3,000, saying that he could buy lumber much cheaper if he could pay cash. The Board agreed to let him have \$3,000, upon an agreement that he should purchase lumber with it, and that the lumber purchased should be the property of the Board. The Board then directed me, as treasurer, to advance the \$3,000 to Ely. I gave him a check on New York, etc."

This statement is denied by Ely; but as the finding was for the defendant, it may be assumed to be correct.

It further appears beyond dispute, that the lumber bought by Ely was put on the lot owned by defendant, where the building was to be erected, and was used by Ely as needed in the building.

In October, 1872, one of the plaintiffs came to Cameron to get the balance due the firm from Ely. He was informed by the treasurer of the verbal agreement which has been stated, and that Ely had been paid upon the estimates certified by the architect. At the suggestion of this member of the firm, a re-examination was made, and a mistake of \$366 was discovered in favor of Ely, and the amount was paid to plaintiffs.

There is no dispute that the lumber when sent down from Iowa was put on the school lot where the building was to be erected, and remained there until this suit was brought. Upon this state of facts, the court declared the law to be as follows:

1. That from the evidence it appears that the lumber in question was purchased by A. J. Ely for the purpose of erecting a public school building for defendant, in the town of Cameron, and was placed by him on the ground of defendant, and was inspected and received by a superintendent em-

ployed by defendant, and estimates were made by said superintendent in said Ely's favor, which included said lumber and the freight thereon, and that said estimates were paid by defendants to said Ely, and that plaintiffs had notice of these facts before they purchased the lumber of said Ely; therefore the finding and judgment must be for defendants.

- 2. If it appears from the evidence, that at the special instance and request of plaintiffs, defendant's superintendent made a second estimate of said lumber, and that by said second estimate it was found that there was still due and unpaid a certain sum of money in addition to the amount found due upon the first estimate, and that the amount found due and unpaid was paid by defendant to plaintiffs, and at their request, the finding and judgment of the court must then be for the defendant.
- 3. If it appears that subsequent to the signing of the written contract the defendant furnished Ely \$3,000, with which to purchase lumber, before he was entitled to any money under said contract, and in consideration thereof said Ely agreed that all lumber purchased by him should be the property of defendant when delivered on defendant's ground, and that plaintiffs had notice of these facts before they purchased said lumber of said Ely, the finding and judgment of the court must be for defendant.
- 4. If it appears that the purchase of the lumber by plaintiffs of Ely, was conditioned upon the recovery of the debt against him from the defendant, and that plaintiffs did not give said Ely credit for the amount of said debt, the finding and judgment must be for defendant.

And upon these declarations of law, the court, to whom the case was referred without a jury, found for defendant.

Several instructions were asked by the plaintiffs, all of which were refused. These instructions, in substance, asserted that Ely was not an agent of the defendant, and therefore that the lumber bought by him, as contractor, was his property, and the sale to the plaintiffs conveyed the property.

The law in regard to the rights of property in the manufacturer or builder of a chattel and the person who employs him, who is termed the orderer, is thus stated, in Story on Sales and in other treatises, which have adopted or followed the leading English authorities.

"Where the contract is executory for the sale of articles not in existence, but to be made or manufactured, no property passes to the orderer, until the thing is completely finished, and is either delivered to him, or is appropriated to his benefit, set apart for him, and is accepted by him. Nor does it make any difference that the price is advanced, or that the contract contains a specification of the dimensions and other particulars of the thing to be made, and fixes the precise mode and time of payment by months and days; since the agreement is considered as a bargain for an entire thing, and not for unfinished parts of it. So also, in such case, the maker would not ordinarily be bound to deliver to the purchaser the particular thing upon which he is engaged and intends for such purchaser, or which the purchaser supposes to be intended for him; but he may, if he pleases, dispose of it to some other person, and furnish another article corresponding to the specification or the contract. But where the contract provides that the article shall be built under the superintendence of a person appointed by the orderer, the manufacturer could not compel the orderer to accept a thing not constructed under the direction and approved of by the superintendent; and therefore he could not sell to any other person than the orderer an article, the building of which had been so superintended, since, if he could, he would thereby be enabled to burden the orderer with the expense of employing a person again to superintend the building of another vessel. The fact, therefore, that a superintendent is appointed, is considered as an appropriation of the materials approved by him and used in the construction of the thing, and an appropriation of the thing so far as it is constructed." (Sto. Sales, § 233.)

The last paragraph in this section is based on the authority of Woods vs. Russell, (5 Barn. & Ald. 942) and Clark vs. Spence, (4 Ad. & Ell., 448). The rule was applied to ship-builders, and was originally advanced in the case of Woods vs. Russell, and was followed in the case of Clark vs. Spence, chiefly on the ground that ship-builders and orderers (as they are termed) might have acted on the faith of the first decision; and the English courts, on conservative grounds, therefore followed the first decision, though with considerable doubt as to its propriety.

In New York and in Massachusetts the principle announced in Woods vs. Russell, that the appointment of a superintendent, and the agreement to advance money to the mannfacturer as the building progressed, would thereby, (contrary to the general rule of law) invest the property in the orderer, is repudiated. (Andrews vs. Durant, 1 Kern., 35; Williams vs. Jackman, 16 Gray, 514; Briggs vs. "A Light Boat," 7 Allen, 287.) In these cases it was held that the general rule of law was well settled, that under a contract for building a ship or making any other chattel, not in existence at the time of the contract, no property vests in the purchaser during the progress of the work, nor until the ship or other chattel is finished and delivered. At the same time it was conceded that there were exceptions to this rule, growing out of express stipulations in the contract between the orderer and the builder, by which the building, as it progressed, might vest in the purchaser from time to time. But they denied that an agreement to pay the purchase money in instalments, as the work progressed, or a stipulation for the employment of a superintendent by the purchaser or orderer would operate to change the general rule of law, and vest the title in the orderer to so much of the chattel as was built.

The question, as these American courts declare, depends on the intent, to be inferred from an interpretation of the contract. If the intent of the parties to the contract is to invest the property in the purchaser during the progress of the work and before its completion, the courts will give effect

to such intent, and the property be held to pass; but the general rule of law will prevail unless such intent is clearly manifested.

These principles relate to chattels, and have been chiefly applied in cases of ship building; but are equally applicable to builders of houses, so far as the materials for the building are concerned, with the exception that when the materials are once put in the building and thereby become a fixture, the owner of the land, who employs the contractor, of course owns the building on it, or so much of it as is completed.

Adopting then the modification of the English rule, as laid down in Woods v. Russell, made by the courts in New York and Massachusetts, in accordance with well settled principles, and conceding that a special contract may change the general rule of law, and transfer to the orderer property in the materials to be put into the building by the contractor, it is evident that in the case now before the court, the main question decisive of the merits of the case is, whether, under the contract between the contractor and the School Board, the lumber in question was transferred to the Board, so soon as bought by Ely and placed on the lot where the school house was to be built.

The testimony in this case, on this point, has been copied. If the contract executed by the Board and Ely had embraced such a provision as is proved by the testimony of one of the members, the case would be clear. But the written contract in evidence made no such provision. On the contrary, the contractor, Ely, was to furnish materials, and the board might advance to him money to buy them, on the certificate of the architect. To secure the board against misappropriation or other failure of the contractor, a bond in \$20,000 was required of the contractor. The contract was duly signed according to law, and the bond was accepted according to law.

At the same meeting of the Board at which the contract was executed, it appears that Ely applied for an advance of \$3,000, to enable him to buy lumber. This advance was made, but upon the condition that the lumber so bought

should be the property of the Board. This is stated by a member of the Board. No minute of such contract was entered; no record shows its existence. The written contract, made on that day, contains no such stipulation.

The 13th section of the Act, concerning schools, Art. 2 provides that, "all regulations, orders, resolutions and other acts of said Board may be proven in all courts and places, either by a sworn copy thereof, or a copy certified by the president and secretary, and authenticated by the seal of the Board."

But there are, no doubt, other modes of proving the action of the Board. In this ease their action is established by a written contract. The question is whether a parol contract made by one or two of the members could alter the written contract, on the same day it was executed, or whether the whole Board could do so, without a record of such resolution.

There is no doubt that written contracts may be altered by subsequent parol agreements, in relation to the time of performance or in regard to matters about which the written contract makes no provision. But in this case the written contract makes ample provision for advancement of money to Ely for materials; and, for security for such advances, requires his bond for \$20,000. The parol contract requires an additional security of a transfer of the materials to defendant. The two contracts were inconsistent. They were made on the same day and cannot be reconciled. By the written contract any amount might have been advanced by the Board, for materials, if the architect so certified. The amount of \$3,000 was advanced by the Board to enable the contractor to buy lumber, on the condition that the lumber bought and delivered should belong to the Board. This would make the contractor a mere agent or servant of the Board, so far as materials to the value of \$3,000 are concerned, and would give to the Board the property in such materials, so soon as they were delivered on the lot where the house was to be erected. By the written contract, the contractor was bound to furnish materials, and such materials were

of course his property until put into the building, and any loss or destruction of them by fire or otherwise, would be his loss. But by this parol agreement, said to have been made contemporaneously with the written agreement, the materials belonged to the defendant as soon as they were delivered to the contractor, and if lost by fire or other accident, the loss would have fallen on the defendant. There is then a great discrepancy between the written and the oral contract; the latter varying from the former in essential particulars, relating to the same subject matter. The oral contract is evidently inferred from loose conversation between two members of the Board (composed of six persons) and the contractor, and was really differently understood by the parties to it. The written contract was a carefully prepared instrument in writing, adopted formally and regularly by the Board, and signed by both parties, and was executed in the manner which the law authorized.

It might be questioned if the School Board had any authority, under the law, to invest \$3,000 in lumber, and risk the chances of its being used in a building which they had authority to have built. But, conceding that they had the power to do this, the contract should have been in the form, and authenticated in the mode, required by the general and special law. The loose conversation between members of the Board and the contractor, after a formal execution of a written contact between the Board and the contractor, cannot be allowed to vary the written contract. It would be unsafe to both parties to allow such parol variations; and the well settled rules of law do not permit such proofs. The third instruction, therefore, given by the court for the defendant, was erroneous, and this instruction was upon a point on which the merits of the case mainly depend.

The first instruction seems to be based on the law applicable to chattels, as declared in the case of Woods vs. Russell, and followed by the compilers of elementary treatises in this country. It, however, goes a step beyond, in assuming that the materials on the ground, designed to go into the building

but not in fact so used, became the property of the owner of the lot, or the orderer (as he is termed in some of the books) the moment they were placed on the ground by the contractor, although by the terms of the contract the builder was to furnish the materials, and there was no special contract (as assumed in the 3rd instruction) to transfer the property to the orderer. And this doctrine was based on the ground that a superintendent was appointed by the orderer, and that the manufacturer or builder was to be paid in instalments, as the work progressed, and that in such cases, where the materials were inspected and allowed by the superintendent, the title to them at once passed to the purchaser or orderer. But the general law is otherwise, as the cases in New York and Massachusetts, and indeed in England-unless we except the case of Woods vs. Russell-show; and there must be a special agreement between the contractor and his employer, to transfer the property so bought by the contractor to his employer: and in this case there was no such agreement, except the parol one heretofore considered. Or this instruction may have been based on the assumption, that when the builder put the lumber on the ground of defendant, with the intention to use it in the building he was to erect on such ground, this alone transferred the title in the materials to the owner of the ground. But this is not the law. The materials belonged to the builder, and were at his risk until actually put in the house. The fact that the builder bought them with a view to putthem in the defendant's house, did not change their ownership, nor did the inspection of the superintendent or architect have this effect. (Johnson vs. Hunt, 11 Wend., 187; Mucklow vs. Mangles, 1 Taunt., 319; Merrill vs. Johnson, 7 Johns. 473.)

The lumber bought of the plaintiffs in this case, it seems, cost \$600 more than the money advanced by the defendant. It does not appear whether all the lumber was needed for the school building or not. By the terms of the contract, the building was to have been completed in November, 1872, and it was on the 28th of December, 1872, that the plaintiffs, or

one of them, procured the transfer of lumber to the value of \$1,750, then still on the lot where the building was to have been erected. When the house was finished does not appear.

The second instruction given by the court was based on a supposed estoppel, produced by the act of one of the plaintiffs, in receiving some \$300 from the treasurer, in October, which was, on a re-examination of the accounts between Ely and the Board, found to be due to Ely. We are unable to see any ground for such an application of the doctrine of estoppel. The plaintiffs were creditors of Ely, and not unwilling to collect the debt, or so much of it as could be obtained from Ely or from the defendant who employed him. Their reception of \$300 dollars from the treasurer, which upon reexamination of Ely's account was found to be due him, was no admission in regard to the property now in dispute; in fact, had no connexion whatever with it. The same observation will apply to the fourth instruction, which directs a verdict for defendant, because the plaintiffs never entered a credit on Ely's account, when they took the bill of sale he gave them for the lumber; in other words, because they did not know whether their title under this sale would be valid or not.

They filed a mechanic's lien on the building, which was also a matter of law about the efficacy of which they might be mistaken.

The merits of the case, it is obvious, depend on the propriety of the 3d instruction, which has been already examined and passed on. It may be added to what has been said on this instruction, that under our statute concerning fraudulent conveyances (Wagn. Stat., 281, § 10) a doubt might be entertained in regard to the power of Ely to transfer the title of this lumber to the Board, so as to preclude his creditors, by the verbal agreement testified to, without any visible change in the possession, unless Ely is to be regarded, so far as this transaction is concerned, as a mere agent or servant of the board.

It is clear from the contract formally entered into between the board and himself, that he occupied no such position, but State v. Gordon.

was a contractor to build the school house, and not a mere agent of the Board. When he bought the lumber now in question and other lumber used by him in the building, he bought it on his own account, and not as a servant or agent of the Board, and he was so treated by the plaintiffs. That he borrowed a portion of the money paid to plaintiffs from the Board, or from any one else, could not affect the rights of the plaintiffs. He was the owner of the lumber, when delivered to him. Although the delivery was upon the ground owned by the defendant, his title to the materials was not changed, unless the verbal contract referred to, conceding it to have been valid, could have the effect of transferring the possession.

The judgment must be reversed and the cause remanded; the other judges concur.

STATE OF MISSOURI, Plaintiff in Error, vs. HARRIET GORDON, Defendant in Error.

Misdemeanors, statutory—Jurisdiction of—Power of Legislature to determine.—The legislature has the undoubted right, in reference to statutory misdemeanors, to say in what particular jurisdiction they shall be tried, and to make that jurisdiction exclusive of all others.

2. Misdemeanors, jurisdiction as to—Words of restriction and exclusion—Construction of statute.—When the power to hear and determine statutory misdemeanors is given to a municipal corporation, but no words of exclusion or restriction are used, the remedies between the State and the corporation will be construed to be concurrent; but where the manifest intention is that the prosecution shall be limited exclusively to one jurisdiction, that intention must prevail. And authority was unquestionably conferred on the city of Liberty by its charter of 1868, (Adj. Sess. Acts 1868, p. 221, § 12,) to take exclusive cognizance of misdemeanors.

Error to Clay Circuit Court.

John A. Hockaday, Attorney General, with James E. Lincoln, for Plaintiff in Error.

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This court has long since settled the question that both town authorities and the State can entertain concurrent jurisdiction over similar offenses. The first that asserts or acquires its jurisdiction over a particular case, controls it to the exclusion of the other. In this case, as the State instituted the prosecution, it would be a bar to any action by the city authorities of Liberty, and so vice versa. (State vs. Cowan, 29 Mo., 330; State vs. Simonds, 3 Mo., 414; 4 Mo., 376; 10 Mo., 410; 9 Mo., 526.)

John Y. Rucker, with Simrall & Sandusky, for Defendant in Error.

I. The General Assembly has the power to vest exclusive jurisdiction in a municipal corporation. (9 Mo., 531; 29 Mo., 333; 9 Mo., 692.)

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted by the grand jury of Clay county for unlawfully disturbing the peace of certain families who, it was alleged, resided in the city of Liberty.

A motion was made to quash, for the reason that the indictment charged that the offense was committed within the corporate limits of the city of Liberty. This motion was sustained and the State sued out her writ of error.

The only question is whether, by the charter of the city of Liberty, the municipal authorities have the exclusive power to take cognizance of and punish misdemeanors of the description contained in the indictment.

The charter provides that "all persons charged with and convicted of any misdemeanor, shall be punished as herein directed and provided, when such misdemeanor was committed within the limits of the city of Liberty; and all laws, punishments, fines, forfeitures, or costs provided or inflicted under the laws of this State, shall be null and void for any such misdemeanor, when it shall appear, from the indictment or the evidence of the commission of such offense, that the same was committed within the limits of said city; the true intent

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and meaning of this act being, that all charges of misdemeanor, as herein defined, when committed within the limits of said city, shall be punished only in manner and form as defined and described under this act and the laws or ordinances of said city Council within their authorized legislative authority; provided, however, that the recorder shall have no greater jurisdiction than justices of the peace in similar cases, and shall have no authority to try and punish offenders where the maximum penalty, fine or forfeiture, fixed for the offense by the general statutes of the State, exceeds the sum of one hundred dollars." (Acts 1868, p. 221, § 12.)

The penalty or punishment for the offense, in this case, is fixed by the statute at a fine not exceeding one hundred dollars. (Wagn. Stat., 496, § 27.) So it falls clearly within the jurisdiction delegated to the corporate authorities.

The legislature has the undoubted right, in reference to statutory misdemeanors, to say in what particular jurisdiction they shall be tried, and to make that jurisdiction exclusive of all others. When the power to hear and determine these minor offences is given to a municipal corporation, but no words of exclusion or restriction are used, the remedies between the State and the corporation will be construed to be concurrent; but where the manifest intention is that the prosecution shall be limited exclusively to one jurisdiction, that intention must prevail.

The act conferring the power on the corporate authorities of the city of Liberty, to take exclusive cognizance of this case is too clear to admit of question or doubt. It not only gives the jurisdiction in unmistakable terms, but it makes all laws, punishments, fines, forfeitures or costs, provided for or inflicted, under the laws of the State, null and void, whenever it appears from the indictment, or the evidence, that the misdemeanor was committed within the city limits. It would be difficult to use clearer language, or to show a stronger intent of vesting exclusive jurisdiction in the corporate authorities.

The judgment should be affirmed; the other judges concur. 25—vol. Lx.

Neilson v. County of Chariton, et al.

WILLIAM M. NEILSON, Appellant, vs. THE COUNTY OF CHARI-TON, et al., Respondents.

 Military bounty land—Right of action accrued before August 1st, 1866— Limitation, what statute governs.—One whose right of action for the recovery of military bounty land, accrued prior to the act of August 1st, 1866 (Wagn. Stat., 915, § 1), is not barred by two years of adverse possession thereafter. In such case, the ten years limitation act, and not that of two years, applies. (Wagn. Stat., 921, § 32.)

2. Trustee's deed under deed of trust—Recitals in, not prima facie evidence, when.—The recitals contained in a deed given by a trustee acting under a deed of trust are not prima facie evidence of the truth of those recitals, unless de

clared to be so by the terms of the deed of trust.

Appeal from Chariton Common Pleas.

A. S. Harris, with C. & R. W. Hammond, for Appellant.

I. The two years limitation in § 1, art. 2 of the Limitation Law, Wagn. Stat., 915, does not apply in this case. That section did not go into effect until August 1st, 1866, and plaintiff's right of action accrued in June, 1865. The limitation law, then in force, was that of ten years. (See § 32. art. 2, supra. (Billion vs. Walsh, 46 Mo., 495; Gilker vs. Brown, 47 Mo., 110, 111; McCartney, Adm'r, vs. Alderson, 54 Mo., 324)

In New York where the limitation in force at the time the right of action accrued was repealed, and a shorter limitation adopted, it is held that the limitation in force when the right of action accrued applies. (Van Hook vs. Whitlock, 3 Paige, 416, 417; People vs. Supervisors, 10 Wend., 365; Jackson vs. Brooks, 14 Wend., 654; Champlain vs. Valentine, 19 Barb., 488.)

II. Without any such saving clause as that of § 32, the two years' limitation would not apply here, because statutes are always held to be prospective only, unless they cannot have the intended operation by any other than a retrospective construction, or are plainly expressed to be retrospective. (People vs. Supervisors, supra; Ang. Lim., 2 Ed., 18, § 11.) Moreover, in this State, the legislature is forbidden to pass retrospective laws. (State Const., Art. I, § 28.)

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The case of Callaway vs. Nolley (31 Mo., 393), does not apply. The Limitation Act of 1847 had no provision like that of § 32, above referred to.

A. W. Mullins, with C. W. Bell, for Respondents.

I. Plaintiff's action was barred. (Wagn. Stat., 915, § 1; Billion vs. Walsh. 46 Mo., 492; City of Carondelet vs. Simon, 37 Mo., 408; Callaway County vs. Nolley, 31 Mo., 393.) As to a bar by limitation, equity follows the law.

Sherwood, Judge, delivered the opinion of the court.

The material facts of this case are these:

In 1857, F. W. Hoffman conveyed the property in controversy (a lot in the city of Brunswick), to A. M. Day, subject to a mortgage to Chariton county, executed by Hoffman in 1854. In 1859, Day conveyed to A. D. Day, who, in 1860, executed a deed of trust to one Barr, and in the same year the plaintiff became the purchaser of the property in dispute at a sale made under the last named deed.

In 1865, a sale took place by virtue of the mortgage made in 1854, to the county, and Frederick Passe, the father of the minor defendants, bought thereat, and entered into possession, which is still retained by those claiming under him.

The court below dismissed plaintiff's petition, holding that though the sale made under the mortgage in 1865, was void, yet that the lot in question being a part of the military bounty land tract, and the action not being brought within two years after adverse possession taken by Frederick Passe, deceased, the statutory bar was available as a defense, which precluded any otherwise existent right of plaintiff to redeem.

I. The provisions of the act in relation to lands of the character in controversy never went into effect until August 1st, 1866. (Gen. Stat., 1866, p. 745, § 1; Id., 882, § 2.)

Plaintiff's right accrued in 1865, at a time when ten years was the period provided as a statutory bar, by the "laws then in force." Consequently, § 32 of the same chapter (ch. 191, G. S., p. 749) is applicable to the case before us; and as the

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plaintiffs suit was brought in 1873, he was not barred of his action. (Abernathy vs. Dennis, 49 Mo., 468; School Directors vs. Georges, 50 Mo., 194; McCartney vs. Alderson, 54 Mo., 320.)

II. The deed made by Barr, the trustee, although somewhat informal, sufficiently referred to the powers conferred by the deed of trust and recited a substantial compliance therewith. But the recitals in the deed of the trustee, would not be *prima facie* evidence thereof, unless so provided in the deed creating the power. (Carter vs. Abshire, 48 Mo., 300.) As it does not appear that the deed referred to, contained a provision of that sort, the deed made by Barr should not have been admitted, without evidence in support of its recitals.

Judgment reversed and cause remanded; all concur except Judge Vories, absent.

THE LIFE Association of America, Appellant, vs. John N. Cravens and Fannie S. Cravens, Respondents.

1. Insurance—Premium note—Parol contract set up as a defense against—Contracts partly written and partly parol, latter part may be shown by parol-Reseission—Recoupments, etc.—Where, in suit by an insurance company on a premium note, the defense was that the notes were given in consideration of a parol agreement by plaintiff to loan defendant certain sums of money, held, 1st. The note and agreement constituted parts of the same contract; and only a part of it being in writing, parol testimony was admissible to prove the remainder. 2d. Notwithstanding the failure to comply with his agreement to loan, defendant would be liable on his premium note unless he offered to rescind the contract of insurance by returning the policy and demanding the note. 3d. Without such defense the amount of plaintiff's recovery on the notes would nevertheless be subject, under appropriate pleading, to be reduced to the extent of the damage suffered by defendant in consequence of plaintiff's failure to make the loan.

Appeal from Ray Common Pleas.

J. W. & J. E. Black, with George W. Dunn, for Appellant.

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I. It is expressly stipulated in the notes sued on, that they are given to secure the payment of the premium on the policy; and parol evidence that they were conditioned upon a loan of money to be obtained of the plaintiff, contradicted the notes, and such evidence was inadmissible. (Singleton vs. Fore, 7 Mo., 515; Ashley vs. Bird, 1 Mo., 640; Lane vs. Price, 5 Mo., 101; Woodward vs. McGaugh, 8 Mo., 161; Jones vs. Jeffries, 17 Mo., 577; 8 Mo., 391; 24 Mo., 509; 1 Greenl. Ev., 9 ed., §§ 275, 281-2.)

Donaldson & Farris, for Respondents.

Hough, Judge, delivered the opinion of the court.

This was an action against the defendants, as makers of three promissory notes, given by them to the plaintiff, for the first annual premium on a policy of insurance, issued by the plaintiff, on the life of the defendant, John L. Cravens, for the benefit of his wife, Fannie S. Cravens, and their children.

The defendants admitted the contract of insurance, and the execution of the notes sued on, but averred that said contract was made upon the express agreement that the plaintiff would loan to the defendant John L. Cravens, upon the insurance of his life and the execution of the notes as aforesaid, the sum of twenty-five hundred dollars, for as long a time as he would continue to pay the premiums on said policy, upon his furnishing satisfactory security for such loan; that defendant complied with all the directions prescribed by the plaintiff to be followed by him in order to obtain such loan, but that plaintiff, without any sufficient excuse, refused to loan to said defendant the sum aforesaid as agreed; that upon such refusal by plaintiff to make said loan he tendered to the plaintiff the policy received by him, and demanded the surrender of his notes, but plaintiff refused to return the same.

The plaintiff denied that the agreement to loan the defendant, John L. Cravens, the sum of twenty-five hundred dollars

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had any connection with the contract of insurance; but avered that it was subsequent to, and independent of, it, and that its refusal to make said loan resulted solely from the failure of the defendant to comply with the regulations of the company, required to be observed by him in order to obtain said loan, and denied that there was ever any offer to return the policy, or any demand for the notes.

Parol evidence was admitted by the court to show that the contract of insurance was entered into upon condition that the contract of loan should also be entered into. To the admission of which the plaintiff objected, for the reason that the notes sued upon expressed upon their face that the consideration for which they were given was the issuance of the policy of insurance aforesaid, and that such testimony was inadmissible to alter or vary the terms of a written contract.

We do not think the objection of the plaintiff was well taken. According to the defendant's theory, the contract of insurance and the contract of loan were mutual and dependent contracts, each having a consideration of its own, but were parts only of one entire contract, which when taken together constituted the real contract of the parties. A part only of this entire contract was reduced to writing, viz: the contract of insurance; and in such case the rule seems to be well established, that parol testimony is admissible to supply that portion of the contract resting in parol. (1 Greenl. Ev., 284a; Beck vs. Beck, 43 Mo., 266.)

Testimony was introduced by the plaintiff and defendants to sustain the positions respectively assumed by them in the pleadings.

There was a verdict and judgment for the defendants, from which the plaintiff has appealed to this court.

Admitting the defendants' statement of the contract entered into, to be the correct one, still the plaintiff must recover, unless the jury should find, that on the failure of the plaintiff to accommodate him with the loan it engaged to make, he offered to rescind the contract of insurance, by returning the policy and demanding his notes. This question

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was not submitted to the jury by the instructions given, and this was the only complete defense which, so far as this record shows, could have been made to the action on the notes.

Without such defense, however, the amount of the plaintiff's recovery on the notes would be subject, under appropriate pleading, to be reduced to the extent of the damages suffered by the defendant in consequence of plaintiff's failure to make the loan.

If A. agrees with B. that he will purchase B.'s horse, and give him his note therefor, for the sum of \$100, upon condition that B. will loan A. \$100 upon his furnishing certain security, and A. receives B.'s horse, giving his note therefor, and B. thereupon refuses to loan A. the \$100 on the security agreed upon, A., in order to avoid all liability upon his note, must return the horse to B. and demand his note. But if A. retains the horse, he cannot, when sued upon his note, set up B.'s failure to make the loan, in bar of the action on the note, although he may set up and recover by way of counterclaim in such action any damages suffered by him, in consequence of B.'s refusal to make the loan.

We do not understand why Mrs. Cravens was made a party defendant, as no judgment could be rendered against her in this action.

The case having been submitted to the jury under instructions which were not in harmony with the views here expressed, the judgment will be reversed and the cause remanded; the other judges concur.

PERRY Buis and Richard Buis, Respondents, vs. WILLIAM Cook, Appellant.

 Bailment—Hire of horse—Care necessary.—The hirer of a horse is only bound to exercise the care and discretion, in his use, which a man of ordinary prudence and discretion would exercise in the use of his own property; and is not liable for injuries arising from sickness not caused or contributed to by his abuse or negligence.

Agency—Misfeasance.—The agent is responsible to a third party for positive misfeasance.—(Harriman vs. Stowe, 57 Mo., 93.)

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Appeal from Andrew Circuit Court.

David Rea, for Appellant.

J. P. Altgeld, for Respondents.

WAGNER, Judge, delivered the opinion of the court.

This action was brought to recover damages for an injury done to a team of horses, in overheating and driving them immoderately by the defendant.

Evidence was introduced by the plaintiff tending to show that one of the horses was killed and the other greatly injured in consequence of the defendant's driving them rapidly, and without exercising the care and proper prudence on a warm day. The defendant gave evidence of a contrary character. As the jury found for the plaintiffs, they must have believed that the allegations in their petition were sustained.

There was but one instruction given for the plaintiffs, and that very clearly laid down the law, respecting the duty of a hirer, in using horses which he has hired. Indeed it is not objected to in this court.

For the defendant, the court instructed the jury that if they believed from the evidence that the mare died and the horse became sick from overheating, whilst the defendant was making his journey, yet, if they further believe that the defendant drove the same in a common and ordinary manner, such as like teams were usually driven to carriages and buggies by persons of ordinary prudence and discretion, and also watered as often, and that defendant exercised such care and attention over the same as a man of ordinary prudence and discretion would have done with his own under the circumstances, then the verdict should be for the defendant.

The jury were further told that if the mare died or the horse was injured from sickness not caused or contributed to, by the abuse or negligence of defendant, then the verdict should be in his favor.

These instructions correctly declared the law; they covered the whole case and were all that were necessary.

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All the other instructions were rightfully refused. It is contended that the fifth instruction should have been given, which proceeded upon the hypothesis that the team was hired to another person and that the defendant, in driving it, was acting in the capacity of an agent, and therefore he was not personally liable to the plaintiff. But of this there was no evidence to take the case to the jury; besides, the proposition of law asserted was incorrect. The abuse and injury to the team was a positive misfeasance, and not a mere omission of duty; and, in such a case, the agent is always liable to the injured third party. (Harriman vs. Stowe, 57 Mo., 93.)

The judgment should be affirmed; the other judges concurring.

DANIEL DIMOND, Respondent, vs. THE KANSAS CITY, St. Jo-SEPH & COUNCIL BLUFFS RAILROAD COMPANY, Appellant.

1. Wilson vs. Kansas City, St. Jo. & Council Bluffs R. R., ante, p. 184, affirmed.

Appeal from Nodaway Circuit Court.

Willard P. Hall, for Appellant.

Johnson & Jackson, with C. A. Anthony, for Respondent.

Vories, Judge, delivered the opinion of the court.

This case is identical in principle with the case of Reason Wilson, against the same defendant, decided at the present term of this court; and for the reasons given in the opinion delivered in that case, the judgment in this case will also be affirmed; the other judges concur.

Webb v. Donaldson, et al.

James W. Webb, Respondent, vs. Wm. A. Donaldson and James L. Farris, Appellants.

 Quieting titles—Statute as to, does not contemplate future interests.—Under the statute touching the quieting of titles (Wagn. Stat., 1022, § § 53, 54), plaintiff cannot compel defendant to litigate his claim to a future interest in an estate, which does not conflict with the possession or right of possession of plaintiff.

Appeal from Ray Common Pleas.

D. P. Whitner, for Appellants.

I. The law contemplates a case where defendants have an immediate right of action at law in ejectment. (Wagn. Stat., 1022, § 53; Von Phul vs. Penn, 31 Mo., 333; 31 Mo., 312; Rutherford vs. Ullman, 42 Mo., 216; 42 Mo., 218.)

II. There can be no just or equitable reason for compel ling defendants to bring an action to try the title when the petitioner can just as well sue as the defendant. (Von Phul vs. Penn, supra; Beal vs. Harmon, 38 Mo., 435.) And from the pleadings in this case, it is apparent that the defendants cannot now bring an action at law to try the title. (Benoist vs. Murrin, 47 Mo., 537.)

Dunn & Shotwell, for Respondent.

I. This being an action under the statute, to quiet titles, it is no reason or excuse for not bringing it, to say that the defendants had no right of possession.

The right of possession may be in one person, and the right of property in another at the same time; but two persons cannot have the title to the same piece of land at the same time.

II. The action of ejectment being a possessory action may or may not settle the title. Had the action of ejectment only been contemplated, the statute would have so said.

III. The legislature intended by the act to give a party a sure and speedy way of ascertaining whether another person was the owner of the land he thought his property, and not to keep him in suspense for an indefinite number of years, until the claim was barred by limitation. And to maintain this

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action, it is only necessary that plaintiff be in possession, claiming an estate of freehold, or for not less than ten years, and that defendants claim title to the same premises; unless they show some equitable and just reason why they should not try their title. (See Rutherford vs. Ullman, 42 Mo., 213.)

Napron, Judge, delivered the opinion of the court.

This action was brought under sections 53 and 54 of article 5, of the Practice Act. (Wagn. Stat., 1022.)

The plaintiff claims, in his petition, to be the owner in fee of the N. E. qr. of S. W. qr. of S. 16, T. 52, R. 28, and to be in possession of the same; and he avers that defendants claim adversely, and prays that defendants may be summoned and ordered to institute a suit to try the alleged title.

The defendants admit the possession of plaintiff. They, however, set up that one Hodges was, in 1842, the owner; that Hodges made a will, by which he devised to his wife, Olivia, "his entire estate, real and personal, to do with, manage and control, during her natural life, and for the use and benefit of raising and schooling his four children;" to be equally distributed among his four children after her death; that said will, after the death of said Hodges was duly probated on February 7th, 1848; that, subsequently, in February, 1873, the will was again proved before the Common Pleas Court of Ray county, a court then invested by law with probate jurisdiction.

It is further stated in the answer, that prior to the death of Hodges, two of his children, named in his will, died intestate, under age and unmarried; that after his death a third child died unmarried, leaving his mother and brother surviving, his only heirs; and, consequently, that the surviving son was, under the will, and by virtue of the death of his brother, the owner of three-fourths of the estate, subject, however, to the life estate of the widow.

The defendants then aver that they are informed that the interest claimed by plaintiff, is the said life estate of the

widow of said Hodges, or whatever interest they may have acquired from her.

The defendants aver that they own the interest of the surviving son, under the will and derived from his brother; but that it is subject to the life estate of the widow, who is still living and they therefore can bring no legal action to recover possession.

The case was tried on these pleadings, no evidence being offered by either party, and the court entered judgment for plaintiff, requiring the defendants to bring an action to try the title without unnecessary delay.

Various instructions were asked and those for the plaintiff were given, and those asked by the defendants were refused.

Motions for a new trial and in arrest were also made and overruled, and exceptions duly taken to all the rulings of the court.

It is unnecessary to set out the instructions or the motions, as it is obvious that the merits of the case depend entirely on a single question presented by defendants' plea. The defendants assume that by a proper construction of Hodges' will, his widow was only entitled to a life estate, and, consequently, upon the termination of this life estate, the surviving son of the deceased father was, by virtue of the will and by reason of the death of his brother, the owner in fee of three-fourths of the estate; but that the widow, who is asserted to be still living, or her grantee, the plaintiff, is entitled to the possession during the life of said widow.

What action, then, were the defendants to bring? It is clear that they cannot maintain ejectment, as they do not claim any right to the present possession.

If there be any form of proceeding to settle the construction of the will and determine who has the fee simple, after the termination of the life estate, the plaintiff can as well maintain such suit as the defendants.

The object of this action is to enable a person in possession and who therefore can bring no possessory action, to compel an adverse claimant to bring his ejectment, and so have the Mercer v. Kas. C., St. Jo. & Council Bluffs R. R. Co.

title settled. But where the adverse claim is simply of a remainder, and does not conflict with the possession or right of possession of the plaintiff, and the defendant can bring no action at law to settle the title, the case is not within the provisions of the statute.

It may be convenient to the plaintiff to ascertain the quantity of his estate, whether for life, or years, or in fee; but these sections of the practice act were not designed to remove such inconveniences, and the parties are left to pursue such remedies as the law already afforded.

The defendants claim no present interest in the property adverse to the plaintiff, and if it is desirable to ascertain who has the future interest, dependent on the life estate, it is just as much in the power of the plaintiff to bring a suit to try such question as it is in the power of the defendants.

The judgment is reversed; the other judges concur.

Washington Mercer, Respondent, vs. The Kansas City, St. Joseph and Council Bluffs Railroad Company, Appellant.

1. Wilson vs. Kansas City, St. Jo. & Council Bluffs R. R., ante, p. 184, affirmed.

Appeal from Nodaway Circuit Court.

Willard P. Hall, for Appellant.

B. K. Davis, with W. L. Johnson, for Respondent.

Vories, Judge, delivered the opinion of the court.

The points raised by the appellant in this case are identical with the points discussed and decided by this court at the present term in the case of Reason Wilson vs. Kansas City, St. Jo. & Council Bluffs R. R. Co.

For the reasons given in the opinion, in that case, the judgment in this ease is affirmed; the other judges concur.

ELIZABETH A. CALLAHAN, et al., Respondents, vs. John W. Shotwell, Adm'r, etc. of Austin A. King, deceased, Appellant.

- 1. Contract of attorney for services—Full performance prevented by death—Action against administrator to recover back part proceeds of land conveyed to secure fee—Substitution of new attorney.—Where an attorney took a conveyance of a tract of land to secure his fee for services to be performed in certain specified cases, of which services his death prevented more than a partial performance, a proper proceeding would be by bill against his estate, to set aside the conveyance upon a tender of so much of the fee agreed upon as was found to be really due; but when the land was sold by his estate, plaintiff might recover back the surplus proceeds over and above the ascertained value of such services.
- In such a case the administrator could not defend against the recovery of such surplus by showing a readiness to perform the remaining services through another attorney.
- 2. Arbitrations and references—Reference of cause no ground for reversal, when.—Where, at the time of the reference of a case, no objection thereto was made or exception taken by either party; and both appeared and took testimony, and the pleadings showed that the taking of an account was necessary, held that the reference would furnish no ground for the reversal of the cause.

Appeal from Ray Circuit Court.

E. F. Esteb & J. W. Shotwell, for Appellant.

I. The court erred in referring this cause without the written consent of the parties. (Wagn. Stat., 1041, § 18; Caulk vs. Blyth. 55 Mo., 293.)

II. If plaintiffs had any right of action in the premises, it was to set aside the quit-claim conveyance to Gov. King upon the payment of reasonable compensation for services actually rendered.

C. T. Garner, with Doniphan & Reed, for Respondents.

I. Defendant's objection to the reference, to avail, must have been made at the time of the order of reference.

II. It is unequitable and against the law for the estate to hold the land and not refund the amount of the unearned services, for which the land was conveyed; and equity will compel a re-payment of such amount. (58 Barb., 233; 59 Barb., 574; 2 Mo., 198; 4 Mo., 304.)

NAPTON, Judge, delivered the opinion of the court.

The suit, during its progress, seems to have assumed a variety of phases; but it grew out of, and is based on, the fol-

lowing contract made by Gov. King in 1869:

"Whereas Elizabeth H. Callahan, formerly Elizabeth Nutter, and James M. Callahan, her husband, have this day conveved by quit-claim deed to me, as tenant in common with Tilton Davis, the following tract of land in Lafayette county (here follows a description of the land, 200 acres); now, therefore, this agreement witnesseth, that in consideration of said land and conveyance, as aforesaid, I do hereby agree with said Elizabeth Callaban, her heirs, etc., to give my personal services, without any additional charge therefor, to the following cases pending and commenced in the different courts of Lafayette County, Mo., to-wit: Lewis Megede vs. said Elizabeth A. Callahan; E. H. Nutter vs. Thomas & Samson; Sallie M. Nutter vs. E. H. Nutter and others; State of Mo. vs. William H. Warner; S. G. Wentworth, Adm'r vs. M. Chapman and others; Sallie M. Nutter vs. J. & E. M. Callahan; and also to all and any cases that may hereafter arise, affecting or designed to affect the title of said E. A. Callahan, formerly Nutter, in and to the land conveyed to her by her . brother Samuel M. Nutter, by deed dated sometime in July or August, 1868; and also agree and bind myself to convey said lands herein described to said Eliz. A. Callahan, her heirs or assigns, by quit-claim deed thereto, so soon as said suit of Sallie M. Nutter vs. E. M. Nutter and others, involving the validity of said transfer by said Samuel M. Nutter to said E. H. Nutter, now Callahan, is finally decided in court, or the further prosecution thereof, as commenced, is abandoned by said Sallie M. Nutter, provided, however, this obligation to re-convey said land as aforesaid, is based and conditioned upon the fact of the payment to me, my heirs or legal representatives, of the sum of \$2,000, with interest thereon at eight per cent. from August 1, 1869, within six months after such final decision or abandonment of said suit as aforesaid; so that should said E. H. Callahan, her heirs or

assigns pay to me, my heirs or legal representatives, the said sum of \$2,000, with interest thereon, as aforesaid, within six months next after said case commenced by said Sallie M. Nutter against E. H. Nutter, now Callahan, and others, shall have been finally decided in court or by her, said Sallie M. Nutter, abandoned, and no further prosecution is commenced or instituted, then this agreement to be void and of no effect or force in law.

Witness my hand and seal, this 8th day of Sept. 1869.

AUSTIN A. KING."

The petition was amended three or four times, and the answers changed; and the record is full of motions to strike out various parts of the pleadings, and there are three or four bills of exceptions, most of which seem to be entirely unnecessary.

The basis of the petition is this, that Gov. King, by this contract agreed to attend professionally, as a lawyer, to sundry cases recited in the contract, and as a compensation was to receive \$2,000, and took a conveyance of 200 acres of land to secure his fee, it being understood that if the \$2,000 was paid he would re-convey; that this contract was in September, 1869, and that he died in March or April 1870, and consequently was unable to perform the contract, except so far as to make the argument of one case on demurrer in the Lafayette Circuit Court, and to give his advice in consultation upon some of the other cases.

And this suit is brought to recover from the estate of Gov. King a return of the money so agreed to be paid as fees, or so much of it as was not earned by his professional services estimated on the basis of an agreed compensation of \$2,000 for all the cases. As no money was paid, but land conveyed rather as a security for fees, such a form of action seems rather new; but it appears somewhere in the course of a record of one hundred pages, that since the death of Gov. King a partition sale of the land between his heirs and Mr. Davis, who was associated with him in the contract, has been made, and the aggregate sales amounted to \$3,200. So that an ac-

tion to set aside the conveyance, which would have seemed the most suitable under the facts, was abandoned; and this suit is really based on a supposed equity in the plaintiff to be refunded out of the estate, so much of the entire fee (which the land was conveyed to seeure) as in equity should be refunded by reason of the failure of the decedent to perform his contract.

It is clear that the contract of Gov. King was not wholly performed by reason of his death occurring but a few months after it was made, and before any of the cases were tried, except one in Lafayette Court, decided on demurrer.

What the value of the services rendered in this and other cases in their preliminary stages was, is of course a matter about which lawyers might be expected to differ.

The case was referred to a lawyer as referee, and a number of witnesses examined; and the report of the referee was that the plaintiff was entitled to \$1,000 damages. This sum would seem to show, that, seeing the estate only received the half of \$3,200 from the sale of the land, the services actually rendered were only worth \$600. The evidence on this point was conflicting, but we concur in the opinion of the Circuit Court in sustaining the report of the referee.

It is hardly necessary to say that the proposal of the administrator to the plaintiff to employ any other lawyer that the plaintiff might select, after the death of Gov. King, was properly rejected from the answer, and excluded from the proof. The contract was for the services of Gov. King; and no substitute could be forced on his client.

It is also objected here, that the case was referred. No objection was made at the time of the reference by either party; nor was any exception taken to the action of the court. Both parties appeared before the referee, and testimony was taken on both sides. As the pleadings stood at the time of the reference, it was evident that an account between the parties was necessary for the information of the court.

It would seem that the proper course to have pursued in this case for the plaintiff to have recovered damages for the

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breach of the contract with defendants' testator, would have been a proceeding to set aside the conveyance upon a tender of so much of the fee agreed on as was really due; but as the title was ultimately sold, and the estate had converted the land to its use, the result in this case is virtually the same.

Although the conveyance to Gov. King was on its face an absolute one, the contract signed by him shows it was merely designed as a security for a sum of money to become due him in certain contingencies. All the money did not become due; and, therefore, on the payment of what was really due, a court of equity would have ordered a reconveyance or transferred the title back to plaintiff.

The judgment is affirmed.

STATE OF MISSOURI, TO USE OF CARROLL COUNTY, Plaintiff in Error, vs. James M. Roberts, et al., Defendants in Error.

1. County Collector—Settlements with County Court—Final settlements of, not conclusive—Sureties of may be proceeded against, how.—The action of County and Probate Courts, in regard to settlements by administrators, guardians and curators, is judicial, and, therefore, a final settlement with the court is conclusive as long as it stands, and can be set aside only on appeal, or by bill in equity brought in the Circuit Court on the ground of fraud or mistake. But settlements between County Collectors and County Courts, are merely those between principal and agent, and not subject to the same restrictions as to subsequent investigation. And in case of a County Collector, suit may be brought against his sureties without prior suit in equity to set aside the settlement.

Error to Carroll Circuit Court.

L. K. Kinsey, for Plaintiff in Error, relied upon Marion County vs. Phillips, 45 Mo., 75.

Hale & Eads, and L. M. Waters, and J. L. Mirick, for Defendants in Error.

I. The final settlement, made by the County Court with the collector, is equivalent to a judgment rendered by a court

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of competent jurisdiction, and will only be impeached upon a proceeding in the nature of a bill in equity for fraud or mistake. (Sullivan Co. vs. Burgess, 37 Mo., 300.) It cannot be done in a suit on the collector's bond. (Jones vs. Brinker, 20 Mo., 87; State to use, etc., vs. Roland, 23 Mo., 93; Marion County vs. Phillips, 45 Mo., 75.)

.II. When a settlement has been regularly made and approved, it cannot be impeached after the term of court, at which it was made, has lapsed, except in a proper case and by a regular judgment. (Owens vs. Andrew County Court, 49 Mo., 372.)

NAPTON, Judge, delivered the opinion of the court.

The suit was against Roberts, the sheriff and ex-officio collector of Carroll Co., and his sureties on his official bond.

It is averred, in the petition, that a final settlement was made by the County Court of Carroll county with Roberts as collector, in February, 1871, and that, in this settlement, Roberts was credited with \$435.23, the amount of taxes due on delinquent lands; that, in fact, these delinquent taxes were paid, and that the alleged delinquents have receipts for the same. In other words it is alleged that the collector received a credit, in this settlement, to which he was not entitled; that this credit was the result of fraud or mistake, and a judgment is therefore asked against him and his sureties.

The answer sets up the final settlement, made by the collector with the County Court, as a bar. To this answer there was a demurrer, which was overruled, and the only question presented by the record is whether this final settlement is a bar to this action.

In regard to settlements by administrators, guardians, curators, &c., the decisions of this court have been uniform, that the action of the County and Probate Courts, in such settlements, is judicial in its character, and therefore a final settlement with the court is conclusive so long as it stands; and it can be set aside only by a proceeding in the Circuit Court, on the ground of fraud or mistake. (State vs. Rowland, 23 Mo., 98, and cases there referred to.)

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A distinction was, however, made in the cases of Marion County vs. Phillips, (45 Mo., 79,) and Owens vs. Andrew Co., (49 Mo., 372,) which we think a sound one. Settlements made with the County Court in regard to administrators, guardians, etc., may properly be considered as judicial acts, since they are judgments of a court on proceedings interpartes in which there is notice required, and in which the county and the court are not interested. In settlements with collectors, it is a mere accounting between principal and agent or between a supervising agent and the subordinate. I refer to the opinion of Judge Bliss, in 45 Mo. 77, where the learned judge has fully discussed this point and established this discrimination, with the sanction of all the court.

It is now insisted, however, that no suit could be instituted against the sureties of the collector, until there had been a suit in equity to set aside the settlement. Undoubtedly, if this settlement could be regarded as a judgment, in a suit or proceeding where the sureties were not parties, it might be a protection to them until set aside. Such has been decided to be the law in regard to settlements of administrators, guardians, etc.

But in this case it is not perceived how this settlement operates with more efficacy than an ordinary receipt. If a sheriff should receive, on an execution, double the amount he receipts for, would the plaintiff in the execution have to go into a chancery proceeding to set aside the receipt? The sureties on his bond are responsible for breaches of it, and although the receipt in the case supposed and the settlement in the case now under consideration, are certainly prima facie evidence in favor of both the sheriff and his sureties, neither can be pleaded as a bar to the action. They may both be explained or set aside as made through fraud or mistake.

Why require two suits to settle what can as well be determined in one?

The judgment is reversed and the cause remanded; the other judges concur.

Gerren v. Hann. & St. Jo. R. R. Co.

L. C. GERBEN, Plaintiff in Error, vs. The Hann. & St. Joe. R. R. Co., Defendant in Error.

1. Damages—Liability of railroads for stock killed on unfenced track in unincorporated towns.—A railroad company will not be liable, without proof of negligence, for the killing of stock along the line of its road where it passes through a town which has been properly platted and recorded and laid out into lots and blocks, and streets crossing the track, which have been dedicated as public highways, notwithstanding that the road, at the point of the disaster, is unfenced. And it would make no difference in such case whether the town is incorporated or not. But the rule would be otherwise where the town exists only on paper and has no streets which are opened or used.

2. Damages—Suit against railroad for—Suit after non-suit must be brought, when, —Under § 5 of the Damage act (Wagn. Stat., 520), the new suit brought against a railroad, after non-suit, must be commenced within one year after the date of the injury. Section 19 of the chapter concerning Limitations (Wagn. Stat., 919.) authorizing the commencement of a new action within a year from date of non-suit, has no application to causes, the time for bringing which is not "prescribed" by that chapter (§ 19), but otherwise limited. (Id., § 26.)

Error to Linn Circuit Court.

Mullins & Burgess, for Plaintiff in Error.

I. Meadville was not incorporated, nor were the stock killed at a public crossing or highway, but were killed where the road was not fenced. (Iba vs. The Hann. & St. Joe. R. R. Co., 45 Mo., 472, 473; Wagn. Stat., 310, 311, § 43.)

II. Plaintiff's cause of action was not barred at the time of the commencement of this suit. (Wagn. Stat., 919, § 19; Shaw vs. Pershing 57 Mo., 416.)

Carr & Leach, for Defendant in Error.

I. Defendant was under no legal obligation to fence its track where plaintiff's stock was killed, viz: in the town of Meadville. (Meyer vs. I. M. R. R., 35 Mo., 352; Lloyd v. Pac. R. R., 49 Mo., 199; Iba vs. Hann. & St. Joe. R. R., 45 Mo., 473; Ellis. vs. Pac. R. R., 48 Mo., 232; Wagn. Stat., § 43, art. II, ch. 37; Hallman vs. R. R., 2 E. D. Smith, 257; Bowman vs. R. R., 37 Barb., 516; Ill. Cent. R. R. vs. Goodwin, 30 Ind., 117; Great W. R. R. vs. Morthland, 30 Ills., 451; Galena & C. R. R. vs. Griffin, 31 Ill., 303; Wier vs.

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St. L. & I. M. R. R. Co., 48 Mo., 558; Lloyd vs. Pac. R. R. Co., 49 Mo., 20.) The case of Iba vs. Hann. & St. Joe. R. R. Co., 45 Mo., 472-3, cited by plaintiff's counsel is not a parallel case. Iba's cow was killed in a town made such only by a paper plat; and no streets were near where the accident happened. In the case at bar, all of plaintiff's stock was killed between streets, and these streets crossed the railroad at right angles and were used daily by the public.

II. The action was not commenced within one year after the cause accrued. (Wagn. Stat., 521, ch. 43, § 6; Kennedy vs. Burrier, 36 Mo., 128; Coover vs. Moore, 31 Mo., 574.)

III. Plaintiff took a voluntary non-suit which act did not stop the statute of limitation from running. (Riddlesbarger vs. Hartf. Ins. Co., 7 Wal., 386.)

The renewal of the suit within one year after taking the voluntary non-suit is not within the intent of § 19 of the statute of limitations. The word "suffers" implies ex vi ter. mini, an involuntary non-suit. Any other construction would permit an endless repetition of lawsuits.

Vories, Judge, delivered the opinion of the court.

This action was brought before a justice of the peace, on the 20th day of July, 1872, under the fifth section of the act of the General Assembly concerning "Damages and Contributions" to recover damages for the killing of certain stock of plaintiff, by the cars used on the defendant's railroad, at a point on said railroad where the same was not fenced.

The section of the statute under which the action was brought is as follows: "§ 5. When any animal or animals shall be killed or injured by the cars, locomotive or other carriage, used on any railroad in this State, the owner of such animal may recover the value thereof, in an action against the company or corporation running such railroad, without any proof of negligence, unskillfulness or misconduct, on the part of the officers, servants or agents of such company; but this section shall not apply to any accident occurring on any portion of such road that may be inclosed by a lawful fence, or in the crossing of any public highway."

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The sixth section of the act provides that "every action instituted by virtue of the preceding sections of this chapter shall be commenced within one year after the cause of such action shall accrue." (Wagn. Stat., 520.)

The cause of action filed by the plaintiff before the justice has four counts: one for the value of a cow alleged to have been killed by the defendant on the 8th day of May, 1871; one for the value of two hogs; and the other two counts each for the value of one hog killed on different days, the last killing being charged to have been done on the 13th day of June, 1871. This suit was commenced in July 1872.

The different counts in the petition were in the usual form, and bring the cause of action stated within the language of the statute.

The plaintiff recovered a judgment before the justice for \$37. From this judgment the defendant appealed to the Linn Circuit Court, where, upon a trial, a new judgment was rendered in favor of the defendant.

The plaintiff filed a motion for a new trial setting forth the usual causes. The court overruled said motion and rendered a final judgment in favor of the defendant.

To this action of the court the plaintiff excepted and filed his bill of exceptions and has appealed to this court.

It is shown by the evidence in the case that at the time named in the petition, at the town of Meadville, a locomotive and train of cars belonging to defendant, when approaching the defendant's depot at said town from the east, ran over and killed a cow belonging to the plaintiff worth twenty dollars; that the cow was killed at a point on defendant's railroad, about eighty yards east of the defendant's depot at said town, and where the road was not fenced. The cow was killed in the day time by a passenger train; that there was no street or public crossing where the cow was killed.

The evidence further shows that the part of the town where the cow was killed was laid off into streets, blocks and lots, and that the town contained about three or four hundred inhabitants.

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The same evidence was given in reference to the killing of the hogs named in the three other counts in the petition, except that the hogs were killed a short distance east of the place where the cow was killed, and that the last of the hogs was killed on the 13th of June, 1871, and that all were killed within the town limits of the town of Meadville, and that the town had never been incorporated.

It was admitted by the defendant, by its attorney, that within six months after the cow and hogs were killed, plaintiff commenced his suit against defendant before E. D. Harvey, a justice of the peace, within and for Parson's Creek Township, Linn County, Missouri, for damages for killing said stock, and that after judgment the case was taken by appeal to the Common Pleas Court of Linn county, and that at the May Term of said court, for the year 1871, plaintiff took a voluntary nonsuit.

At the close of the evidence the plaintiff asked the court to give the jury the following instruction: "If the jury believe from the evidence that defendant, by its servants or agents, ran its engines or cars over, on, to or against plaintiff's cow and killed her at Parson Creek Township, in Linn County, Missouri, at a point on its road where the same was not fenced, and where there was no public street or crossing, they are bound to find for the plaintiff on the first count in the complaint; and in this case it makes no difference whether the cow was killed in the town of Meadville or not, provided they further believe that said town was not incorporated at that time."

A similar instruction to the one just copied was asked for as to the three other counts in the plaintiff's cause of action. All of these instructions were refused by the court and the plaintiff excepted.

The court then at the request of the defendant, instructed the jury as follows: "1st. If the jury believe from the evidence that the stock sued for was killed in the town of Meadville, where the adjacent land is laid out into blocks, lots, streets and alleys; that said streets cross the railroad at right

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angles, and that said stock was killed between said streets they will find for the defendant." "2nd. If the jury believe from the evidence that the stock sued for was killed in immediate vicinity of a railroad depot, not more than seventy-five or eighty yards distant from the depot, and that twenty yards of the space was a public road, and that it was necessary for the transaction of business with the public, and for its convenience in the reception and discharge of freight and passengers that such space should be left open, they will find for the defendant." "3rd. If the jury believe from the evidence that the stock sued for was killed within the platted and recorded limits of the town of Meadville, where the same is laid off into lots and blocks, intersected by streets and highways dedicated to public use, they will find for defendant." "4th. Unless the jury find from the evidence that the action was commenced before the justice of the peace from whose judgment the appeal was taken, within twelve months next after plaintiff's cow or hogs were killed, they are bound to find for the defendant."

To the giving of these instructions by the court the plaintiffs objected and excepted.

It is first insisted in this court, by the plaintiff, that the court erred in refusing to give the jury the first instruction asked for by plaintiffs. It is assumed by said instruction that the defendant in order to save itself from the operation of the statute, under which the suit is brought, which makes railroad companies liable for animals killed on the road without any proof of negligence, etc., must show that its road is fenced even in a town or village where the land is laid out in blocks and lots, and into streets and alleys for public use, provided the town or village is not incorporated.

We do not think that this is a proper construction of the law as decided by this court. Whenever the land is regularly laid out into lots, blocks and streets, the streets crossing the railroad, which streets have been dedicated to public use as public highways, it would be unlawful for the railroad company to fence up the streets in such a town; and it would

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make no difference in such case whether the town so laid out into streets, etc., was incorporated, or not. It has been held by this court that the statute under which this action was brought did not apply to cases where animals were killed in such places; but it would be otherwise where the town was merely a town on paper and had really no streets which were opened or used. It is true that in the case of Iba vs. The Hann. & St. Jos. R. R. Co., 45 Mo., 469, the learned judge delivering the opinion of the court, seems to lay some stress on the fact that the town had become disincorporated by non-user; but it is clear from other cases that whether the town is incorporated or not could or might make no difference. (Meyer vs. North Mo. R. R. Co., 35 Mo., 352; Weir vs. St. L. & I. M. R. R. Co., 48 Mo., 558.)

It is also objected by the plaintiff that each of the instructions given in favor of the defendant was improper, and that therefore the judgment should be reversed.

There is no doubt about the correctness of the first instruction given for the defendant, if it was clear from the evidence that the town had been platted and recorded, as the statute provides, so as to dedicate the streets to public use.

The second instruction is a mere abstraction having no evidence even tending to support it.

The third instruction assumes that there was evidence tending to prove that the stock of plaintiff was killed in the platted and recorded limits of the town of Meadville, and that the streets, etc., were dedicated to public use, etc. There was no evidence in the case to show that any plat of said town had ever been made and recorded. The instruction was therefore for that reason wrong.

The question, however, is, did, or could, these instructions do the plaintiff any injury? If the fourth instruction given on the part of the defendant was proper, the judgment must necessarily have been for the defendant regardless of anything that could have been found by the jury upon the matters contained in the other instructions. By the fourth instruction the jury are told that unless this action was commenced with-

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in twelve months after the killing of the cow and hogs, complained of by the plaintiff, they must find for the defendant.

The sixth section of the act under which this action was brought, provides that "every action instituted by virtue of the preceding sections of this chapter, shall be commenced within one year after the cause of action accrued." It is not denied by the plaintiff that more than one year elapsed from the time his stock was killed to the bringing of this suit; but he claims and it is admitted on the record that plaintiff sued for the same injuries within six months after the injuries were committed, and that after said suit had been for some time prosecuted and appealed from a justice's court to a higher court, he suffered a non-suit, and that this suit was brought in less than one year after such non-suit.

The plaintiff insists that by virtue of the 19th section of the second article of the statute concerning the limitation of actions, he had a right to bring a new action at any time within a year after said non-suit was suffered. The 19th section of said act provides that, if any action shall have been commenced within the times respectively prescribed in this chapter, and the plaintiff therein suffer a non-suit, etc., such plaintiff may commence a new action from time to time within one year after such non-suit suffered, etc. (Wagn. Stat., 919.)

By the 26th section of the same statute, it is provided as follows: "The provisions of this chapter shall not extend to any action which is, or shall be, otherwise limited by any statute; but such action shall be brought within the time limited by such statutes.

It will be seen from the above quoted statutes, that the 19th section of our general limitation law has no application to an action brought under the fifth section of the Damage act; but that the action of the plaintiff was required to be brought in the time limited in the act under which the action was brought, just as much so as if no such provision as that contained in the 19th section of the general limitation act existed. That section had no application to the plaintiff's case; and, therefore, the fourth instruction given on the part of the defend-

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ant was a proper instruction, and, from the admitted facts in the case, the plaintiff's action was barred by the lapse of time, and he could not recover. It would, therefore, be a useless act to reverse the judgment, which is clearly shown from the record to be for the right party, merely because some instructions were given which were not warranted by the evidence, but which could not possibly, under the circumstances, have done the plaintiff any harm.

The other judges concurring, the judgment is affirmed.

Basil Shelton, Respondent, vs. St. Louis, Kansas City & Northern Railway Company, Appellant.

1. Railroads—Damages—Stock killed—Uninclosed prairie land.—The failure of a railroad corporation to fence its track will render it liable in damages for injuries to stock along the line of its road, without proof of negligence, where the evidence shows that the land at the point of the casualty was uninclosed and also prairie land. (Cary vs. St. L., K. C. & N. R. R., ante p. 209.)

Appeal from Clinton Circuit Court.

Ray & Ray, for Appellant.

Hale & Eads, for Respondent.

Sherwood, Judge, delivered the opinion of the court.

Action for killing a cow, based on § 43, p. 310, Wagn. Stat. The court sitting as a jury found for plaintiff, doubled his damages, and gave him judgment for \$100.

The case of Cary against the defendant, decided at the present term, is, with one exception, precisely like this one; the only point of difference being that in the latter case it was in evidence that the animal was killed at a point where defendant's road passed through uninclosed prairie lands.

For the reasons stated in that opinion, the judgment will be affirmed; as in the former case the judgment of the trial court was reversed for the sole reason that there was an entire absence of testimony on the point above mentioned. The other judges concur.

ELIZABETH SNYDER, Appellant, vs. The Han. & St. Jos. R. R. Co., Respondent.

1. Master and servant—Master liable for tortious acts of servant in line of his employment—Averments as to.—The rule is firmly established that the master is civilly liable for the tortious acts of his servants whether of omission or commission, and whether negligent, fraudulent or deceitful, when done in the course of his employment, even though the master did not authorize or know of such acts, or may have disapproved of or forbidden them. (Garretzen vs. Duenckel, 50 Mo., 104.) (But the act must be done not only while the servant is engaged in the service he is employed to render, but it must pertain to the particular duties of that employment, and this fact must be made to appear from the plaintiff's petition. (And a general averment that the acts of the servant were in the range of his employment is a conclusion of law and not sufficient.)

Railroad—Damage to child injured while getting on car after invitation of employee—Liability of company.—A railroad company will not be held liable for injuries received by a child while attempting to get upon one of its cars, in consequence of an invitation from one of its servants in charge of the car, where the evidence shows no authority on the part of the servant to permit persons to ride on the car, and it does not appear that the invitation or permission were in furtherance of the interests of the road, or connected in any

manner with the service which the servant was employed to render.

Appeal from Buchanan Circuit Court.

Hill & Carter, for Appellant.

I. The duty of the employees in charge of the train required that they should caution the boy to keep away and resist his getting upon the train. (Kline vs. Cen. Pac. R. R. Co., 37 Cal., 400; Lovett vs. Salem, etc., R. R. Co., 9 Allen, 557; Cook vs. Champlain, 1 Denio, 91; Davis vs. Mann, 10 Mes. & W., 545; Lynch vs. Nurdin, 1 Ad. & Ell., N. S. 29; Beers vs. Housatonic R. R., 19 Conn., 566; Robinson vs. Cone, 22 Vt., 213; Byrne vs. Goodman, 19 Conn., 507.)

II. A master is bound by the acts of his servant in the line and scope of his employment. (Ramsden vs. Boston & Albany R. R.Co., 104 Mass., 117, and cas. cit.; L. M. &. R. Co. vs. Wetmore, 19 Ohio St., 131.) And it is immaterial that said employees acted contrary to instructions. (9 Am. R., p. 11 and cas. cit.; Phil. & Read. R. R. Co. vs. Derby, 14 How., 468-483; Whart. Negl., § 171, and cas. cit.)

III. The master is liable in a civil action. (Redding vs. S. C. R. R. Co., 3 S. Car. [U.S.]1; Winterson vs. Eighth A. R. R. Co., 2 Hilt., 389.)

IV. The boy, in accepting the invitation of those in charge of the train to jump upon the car to ride with them, was not a trespasser. (Am. R., vol. 9, p. 11; cited 107 Mass., p. 108, and cas. cit.)

V. It makes no difference that he was a passenger without hire and may have been received or induced to get upon the train in violation of orders. Still the defendant would be liable. (107 Mass., 108, above cit.)

VI. Whenever servants deal with persons as passengers while acting within the line of their duty, as is charged in the petition, the master is responsible for their acts civilly, even if their acts be acts of positive malfeasance or misconduct. (Pass. R. R. vs. Young, 21 Ohio, 518; Am. R., vol. 8, cas. cit.)

M. Oliver, for Respondent.

I. It is not stated in the petition, whether the train was passenger or freight, or whether respondent's employees, induced or encouraged appellant's son to jump on said train, or what business was transacted by said train. These facts should be pleaded.

II. To make respondent liable, the petition should show that the act of employees, which caused or led to the injury, was lawful, but performed in a negligent or careless manner; and that the boy was injured in consequence. If the act itself was unlawful, it was as a legal proposition without the scope or range of the authority of the employees or servants and respondent is not liable for the consequences.

Hough, Judge, delivered the opinion of the court.

This was an action by the plaintiff to recover damages for the loss of the services of her infant son by reason of injuries alleged to have been inflicted upon him, in consequence of the negligence and carelessness of defendant's servants, and also for expenses incurred by her for medical attendance, and in nursing him during his resulting sickness.

The material portion of the petition is as follows: "The defendant was the owner of a certain railroad, running through the city of St. Joseph and across the streets and alleys thereof, and to the Missouri River Bank, and the engines and cars therein, and was, and for a long time previous to the time of the injuries hereinafter complained of, had been, engaged in the business of running said engines and cars, over and upon said railroad, alternately, from defendant's depot in said city of St. Joseph to said river and back again, making numerous trips each day with its said engines and cars, over its said road between said points, through a densely inhabited part of said city, in the line of its duty and business; and defendant, by its employees, was, and for a long time previous had been, accustomed to and did, while so acting within the line of their duty and business for the defendant, wilfully and unlawfully assume control over, and did carelessly and negligently induce, encourage and permit the son of plaintiff, one Henry Snyder, an infant about eleven years of age, and divers other children and boys, residing with their parents, in the vicinity of, and adjacent to defendant's said road, and in the absence of, and against the wish, entreaties and protestations of their said parents, and while their said cars were in motion, running as aforesaid, over said road, to frequently jump upon and ride upon defendant's said cars, between said points, and that said son of plaintiff, Henry Snyder, being so encouraged and permitted by said defendants said employees, was, in obedience to his childish instincts in the premises, attempting to so jump upon said cars, to-wit, on or about the 25th day of October, 1871, and while said cars were being so run by said employees in defendant's said business, through said city between said points, when said Henry Snyder was then and there thrown down, and under the wheels of said cars, and in consequence of defendant's said carelessness and negligence, his leg was then and there run over by said cars, and was thereby so crushed and mangled, that same had to be amputated; whereby, etc.," and plaintiff claimed damages for the loss of services which would thereby be incurred by her during the whole period of her son's minority.

To this petition the defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The Circuit Court sustained the demurrer and rendered final judgment thereon, for the defendant, and plaintiff has appealed to this court.

The rule is firmly established that the master is civilly liable for the tortious acts of his servant, whether of omission or commission, and whether negligent, fraudulent or deceitful, when done in the course of his employment, even though the master did not authorize, or know of such acts, or may have disapproved or forbidden them. (Garretzen vs. Duenckel, 50 Mo., 107.)

The chief difficulty which has arisen in the application of this rule as appears from the adjudicated cases, has been in ascertaining whether the act complained of was committed in the course of the servant's employment.

Conceding for the present, that the petition in this case charges that the injury complained of was received by the plaintiff's son while attempting to get on the cars, in consequence of an invitation extended to him at the time by the servants of the defendant, in charge of said cars, can the defendant on such a state of facts, be held liable in this action? Can such injury be said to have happened, by reason of any act of defendant's servants, within the scope of their employment?

What was their employment? It is charged to have been the running of the engines and cars of the defendant between two points within the limits of the city of St. Joseph. It does not appear whether such cars were at the time being used in the transportation of passengers, or of freight only; or whether the defendant's servants were merely engaged in switching cars to be thereafter used for passengers or freight.

In the case of Wilton vs. Middlesex R. R. Co. (107 Mass., 108), it appeared that the plaintiff, a girl of nine years of age was walking with several other girls upon the Charlestown bridge about 7 o'clock in the evening, when one of the defendant's horse-cars came along very slowly, and the driver beckened to the girls to get on. They thereupon got on the

front platform, and the driver immediately struck his horses, when, by reason of their suddenly starting, plaintiff lost her balance and fell, so that one of the wheels passed over her arm. It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car and carry them, unless such authority was implied from the fact of his employment as driver. The court says: "The driver of a horse car is an agent of the corporation having charge, in part, of the car. If, in violation of his instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such act is not one outside of his duties, but is an act within the general scope of his agency for which he is responsible to his master. In the case at bar, the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently, she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions."

Wharton in his work on Negligence says, that the principle announced in the foregoing case, cannot be extended so as to. imply authority on the part of the engineer of a locomotive to invite a child on the machinery, and cites in support of his text, the case of Flower vs. Penn. R. R. Co., 69 Penn. St., 210. In that case the fireman on an engine, which, with the tender and one freight car, had been detached from a train of cars, and was stopped at a water station for water, requested a small boy, standing near, to put in the hose and turn on the water; and while he was climbing on the tender to put in the hose, the freight cars belonging to the train from which the engine was detached, came down, without a brakeman and struck the car behind the tender, driving the engine and tender forward ten feet. The boy fell from the tender and was crushed to death. There was testimony that engineers were not permitted to receive any one on the engine but the conductor and superintendent. The court held that the boy was not a passenger, or one to whom the company owed a special duty, and says, "It is evident, therefore, that the case turns

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wholly on the effect of the request of the fireman, who was temporary engineer, to put in the hose and turn on the water. Did that request involve the company in the consequences? This is a very hard case. A willing, bright boy, not arrived at years of discretion, has lost his life in simply trying to oblige the fireman. But we must not suffer our sympathies to do injustice to others, by overriding those fixed principles which underlie the rights of all men, and are essential to justice. It is natural justice that one man should not be held liable for the act of another, without his participation, his privity, or his authority. It is clear that the fireman, through his indolence, or haste, was the cause of the boy's loss of life. Unless his act can be legally attributable to the company it is equally clear the company was not the cause of the injury. The maxim qui facit per alium facit per se, can only apply where there is an authority, either general or special. It is not pretended there was a special authority. Was there a general authority which would comprehend the fireman's request to the boy to fill the engine tank with water? This scems to be equally plain without resorting to the evidence given that engineers are not permitted to receive any one on the engine but the conductor and foreman, or superintendent; that it is the duty of the fireman to supply the engine with water; that he has no power to invite others to do it, and can leave his post only on a necessity. * * It is not like the case of one injured while on board a train, by the sufferance of the conductor, whose general authority extends to receiving and discharging persons to and from the train."

In the case of Lynch vs. Nurdin, (1 Ad. & El. N. S., 29.) chiefly relied on by the appellant, the servant of the defendant was palpably negligent, in leaving the horse and cart, in his charge, unattended in the street, whereby an infant who "merely indulged the natural instinct of a child, in amusing himself with the empty cart and the deserted horse," and to whom no concurrent negligence could be imputed, was injured. There the servant was clearly guilty of a negligent act in the course of his employment,

The case of Eaton vs. D. L. & W. R. R. Co., (13 Am. Law Reg., 665,) decided by the New York commission of appeals, is an elaborate authority to the point that conductors of freight trains cannot create any liability on the part of the company to persons taken by them on such trains, unless the principal in some way assents to it. In that case, however, the evidence not only failed to show that the company assented to the act of the freight conductor, but it was distinctly proved that it forbade the act. See also Judge Redfield's note to that case.

It is patent from the foregoing cases that the acts of the defendant's servant as alleged in the petition, in inducing, encouraging, and permitting the plaintiff's son and others to ride npon the cars operated by them, cannot be viewed as having been done by them in the course of their employment. It does not appear that they were engaged in carrying passengers, or had any authority to permit persons to ride on said cars, with or without compensation, or that the invitation or permission alleged, were in furtherance of the master's interests or directly or indirectly connected with the service which they had, engaged to render to it. The mere fact that a tortious act is committed by a servant while he is actually engaged in the performance of the service he has been employed to render cannot make the master liable. Something more is required. It must not only be done while so employed, but it must pertain to the particular duties of that employment. The general statement that the acts of defendant's servants were within the range of their employment is a mere conclusion of law which cannot help the averment of facts and can avail noth-(Gillet vs. Mo. Valley R. R. Co., 55 Mo., 315.) The facts being conceded, whether a given act is within the scope of a servant's employment is a question of law for the court.

A careful examination of the petition in this case, however, discloses the fact, that no invitation to get upon the cars of defendant, is alleged to have been given at the time of the injury. The petition shows that the plaintiff's son attempted to get on the train of his own motion, and in pursuance of

his childish instincts and in consequence of the former permission and encouragement extended to him by defendant's servants, and was thereby injured. It contains no allegation of negligence on the part of defendant's servants at the time the child attempted to get upon the train. Such an allegation would have brought the case within the rule laid down in Lynch vs. Nurdin, if the negligent acts alleged pertained to the particular duties of the servant's employment.

From all that appears, the defendant's servants were, at the time of the injury, in the exercise of usual and ordinary care, and were not cognizant of the child's attempt to get upon the cars. The previous encouragement, alleged to have been given by defendant's servants to plaintiff's child and other children, to get upon their cars while the same were in motion, even if it could be held to have been within the range of their employment, would not be the proximate cause of the injury complained of here.

Nothing need be said as to the character or extent of the recovery sought here. The petition fails to state a cause of action against the defendant, and the judgment of the Circuit Court will be affirmed. The other judges concur.



Hannah Cooper and her husband, John W. Cooper, Respondents, vs. Robert Ord, Appellant.

- Witnesses—Husband may testify in ejectment for wife's land, when.—In ejectment for land of which the wife is not the separate owner, the husband is a substantial party, and may testify, so far as his own interests are concerned.
- Deed cannot give color of title to possession, when.—A deed can afford no color of title to support a possession ended long before it is made.
- 3. Land titles—Limitations, statute of—Possession—That of different holders—Tacking together of—Color of title, etc.—Subsequent adverse possession.—Where one takes possession under a deed giving color of title to certain land, his possession may be transferred to subsequent parties, and the possession of the different holders may be united so as to make up the statutory period—provided the possession be notorious, etc., and the claim thereby acquired will be good so far as the land actually in occupation is concerned. But such sub-

sequent parties cannot hold other land merely by color of their first grantor's title, independent of any conveyance. And title so acquired by connected possessions may be defeated by subsequent adverse possession for the statutory period.

- Instructions of little value, when.—Where a case is heard by the court as a
 jury, instructions are of but little use except to show the theory upon which
 the case is tried.
- 5. Lands and land titles—Extent of boundaries, how shows to constitute color of title.—It does not always require a written instrument to constitute color of title, but there must be some visible acts or indicia which are apparent to all, showing the extent of the boundaries of the land claimed, to amount to color of title.
- 5. Ejectment—Military bounty land—Color of title.—Where the right of action accrued under the present statute (Wagn, Stat., 915, § 1) two years of open notorious and adverse possession of military bounty land will defeat an action of ejectment—regardless of color of title—as to the land actually occupied by defendant.
- Instructions—Evidence—Refusal.—An instruction not supported by evidence should be refused.

Appeal from Carroll Circuit Court.

Hale & Eads, for Appellant.

I. The court erred in allowing John W. Cooper to testify in behalf of his wife, Hannah Cooper, who was the real plaintiff—the action having been brought to recover the land in her name. He was not a competent witness for her. (Paul vs. Leavitt, 53 Mo., 595.)

II. The court erred in admitting the deed from Collett to Hannah Cooper as color of title to the west half of the land in controversy. The evidence all shows that the defendant took possession of the land in 1866, and the deed from Collett was executed and bears date in 1870. There was no possession under the Collett deed. It was then held adversely by Ord, and an instrument of writing cannot operate as color of title, unless accompanied by possession. It must either transfer the title or be accompanied by a transfer of the possession. (Crispen vs. Hannavan, 50 Mo., 549.)

The court erred in giving the third instruction asked by plaintiff.

L. H. Waters, with Ray & Ray, for Respondents.

I. There was such privity between the various occupants as will refer the possession of each to the original entry, and the plaintiffs are entitled to recover upon the title acquired under the statute of limitations by their adverse possession. so far as the east half of the land in question is concerned. (Ang. Lim., 5 ed., § 414; Crispen vs. Hannavan, 50 Mo., 536; Fugate vs. Pierce, 49 Mo., 441; Rannells vs. Rannells, 52 Mo., 109.)

II. Defendant obtained possession by tampering with plaintiffs' tenant, and defendant will not be permitted to controvert their title. (Tayl. Landl. & Ten., 705; Ang. Lim.,

5 ed., § 437; Rutherford vs. Ullman, 42 Mo., 416.)

III. When no title appears on either side, a prior possession, though short of the statutory bar, will prevail over a subsequent possession which has not ripened into a title, provided the prior possession was under a claim of right, and provided also that the defendant is a trespasser and entered upon the actual or constructive possession of the plaintiff. (Crockett vs. Morrison, 11 Mo., 3; Bledsoe vs. Simms, 53 Mo., 305.)

The prior possession of plaintiffs, as to the east half, and the prior possession of Collett as to the west half, which were transferred to the plaintiffs, certainly entitled them to recover as against defendant, who had entered under plaintiffs' tenants.

IV. The defendant failed to show any colorable title. The record of the deed from Love and Reynolds to his landlord, were properly excluded. The original seemed to be in the landlord's possession, and should have been produced. Having entered under plaintiffs tenant, the defendant could not set up an outstanding title in any one.

V. The plaintiff, John Cooper, was a competent witness to prove the facts proved by him. If he was not, the exceptions taken in the court below to his testimony were not preserved. He is competent now, since the act of 1874. (Laws of 1874, p. 60, § 1.)

VORIES, Judge, delivered the opinion of the court.

This was an action of ejectment. The petition states, that in 1866 plaintiffs were, had for a long time been, and still were, husband and wife, and that on the first day of July, 1866, the said Hannah Cooper, the wife, etc., was, had for a long time previous thereto been, and still was, the owner in fee of the southwest quarter of section twelve, in township fifty-four, of range twenty-two, in Carroll county, Missouri; that on the day and year last aforesaid, they were entitled to the possession of the said premises, and being so entitled, the defendant afterwards, on the 10th day of July, 1866, entered into and upon said premises, and unlawfully holds the possession thereof from plaintiffs, to their damage, etc.

Defendant in his answer admits that plaintiffs are husband and wife, and that defendant is in the possession of the lands named, and states that he holds under title thereto; but all other allegations of the petition are denied.

The suit was commenced on the 7th day of September, 1870. The trial was had before the court without the intervention of a jury. Neither party produced or relied upon any paper title to the land in controversy, but each relied on possession under color of title.

The plaintiff introduced in evidence, as color of title to the east half of the quarter section of land named in the petition: 1st. A quit-claim deed, bearing date March 7th, 1853, and recorded in 1870, from Elijah G. Simpson to Jesse Parker, for said east half of said land. 2d. A quit-claim deed for the same land, bearing date the 1st of August, 1854, from Jesse Parker to Elizabeth Hacker.

Plaintiffs then offered in evidence, for the same purpose, what purported to be a deed from Elizabeth Hacker to plaintiff. Hannah Cooper, for the same land.

This paper was objected to by the defendant, on the ground that it appeared from the face of the deed that the name of the grantee therein had been changed from John W. Cooper to Hannah Cooper. To explain this erasure and change in the deed, both parties introduced evidence, from which it

clearly appeared that said deed was originally executed to John W. Cooper, and afterwards changed, without authority, by erasing the name of John W. Cooper and inserting the name of Hannah Cooper, at the request and by the direction of said Hannah. Whereupon the court sustained the defendant's objection to said deed, and excluded the same from the evidence in the case.

The plaintiff then introduced evidence tending to prove that one Elizabeth Baley first improved this east half of said land in the spring of 1851; that she lived on said land for about one year, and that one Newton occupied the land one year under Mrs. Baley; that Mrs. Baley then sold the said land to Jesse Parker, who took possession under his purchase; that Parker in 1854, and before he received a deed for the land, sold the same to Elizabeth Hacker, Parker remaining in possession until October, 1854, when he delivered the possession to Mrs. Hacker, on the same day that he went out; that Mrs. Hacker continued in the actual possession of the improvements, and improved parts of said land, claiming the whole from the 3d day of October, 1854, to the 25th day of October, 1863, cultivating a field in said east half of said quarter section, claiming the whole of said half; that Mrs. Hacker in September, 1863, sold said land to John W. Cooper or to his wife, Hannah Cooper, and made a deed to John W. Cooper; that Cooper and wife took possession under the purchase from Mrs. Hacker in October, 1863, and remained in possession until the month of October, 1864; that Mrs. Baley put into cultivation, while she occupied the land, a field of five acres, and erected a house; that afterwards the field was increased to fifteen acres, and a barn erected on the land; the possession was continuous from 1851 up to October, 1864, when plaintiff moved from the land, leaving the same in the care and possession of others, as their tenants, who cultivated the improved land; that during the time that said tenant was so cultivating the land, one Fisher, having made the acquaintance of a man by the name of Love, who, with one Reynolds, claimed to own the land, was requested

by said Love to take possession of the house on said land, (which was then vacant) and hold the possession for Love and Reynolds. Fisher agreed that he would go into the house and hold it until he was ready to move elsewhere, and in the month of July 1866, Fisher removed into the house, and swears that he went in with the consent of the tenants, but this is denied by them. After Fisher took possession of the house, David Ord, the father of defendant, purchased the land of Love and Reynolds. After this purchase, defendant, who was representing David Ord, requested Fisher to let him know when he was going to vacate the house. This Fisher did; and when Fisher went out of the house, Ord, the defendant, went in. Ord took possession in October or November, and has held possession ever since.

Plaintiff, John W. Cooper, was then offered as a witness. The defendant objected on the ground that he was not competent to testify for plaintiffs. The court ruled that he was not competent for his wife, but that he might testify as to any matter affecting his own interests, and he was admitted to testify in the case. To which ruling of the court, the defendant excepted.

Cooper testified that the purchase from Mrs. Hacker, of the eighty acres of land was made by his wife in 1863, and that they moved on the land shortly after, and remained there for about one year; that he then left, leaving his wife in possession; that the defendant, Ord, took possession of the land in controversy in October, 1866, under a purchase from W. R. Love, of a half section of land including the land in controversy; that the defendant was a tenant of David Ord, who claimed the land under purchase from Love; that Fisher was in possession under plaintiff and let defendant in, and was paid for so doing by defendant; that witness ordered defendant to leave the land, but he claimed to be the owner, and would not leave.

It was admitted by both parties that the land in question was military bounty land, and was patented to Ethan Hurlburt.

The plaintiff then offered in evidence, as color of title to the whole quarter section of land in controversy, and for the mere purpose of showing a transfer of possession to plaintiffs, and for no other purpose, a deed from Henry Collett to Hannah Cooper, purporting to convey or quit-claim to her the quarter section of land in controversy, which deed was dated on the 28th day of August, 1870, and was for the consideration of one dollar.

The defendant objected to this deed, because there was no evidence of any possession of plaintiff under said deed, and on the ground that it was admitted that defendant had been in possession since October, 1866. This objection was overruled by the court, and said deed admitted as color of title; to which the defendant excepted.

The plaintiffs then introduced Henry Collett and others, whose evidence tended to prove that in the year 1859 there were two improvements on the quarter section of land in controversy; that the improvement on the east eighty extended on to the west eighty; that Elizabeth Hacker lived on the east eighty at the time; had a house, stable and field on it. that there was a house on the west eighty and between one and two acres of land cleared and enclosed, and some fruit trees on it; that Mrs. Marshall and family were then living in the house on the west eighty acres; that Mrs. Marshall sold her interest in the land to Mrs. Sarah Ann Helm, who then took possession and lived there not quite two years, and sold the place to said Collett; that Collett took possession of said west eighty acres and cultivated the lot thereon; that Collett bought the west eighty before Fisher went into the possession of the east eighty acres; that Collett afterwards removed the house off from the west eighty acres to another farm, the field or lot being left enclosed, to protect the trees and for cultivation; that the remainder of the improvements, including the fence around the lot or field, was removed from the west eighty acres since Ord moved on to the east eighty; that since Ord moved on the east half he has cut timber on the west half, and claimed to own and be in possession of it;

that the deed from Collett to Hannah Cooper was signed by Collett, and was made at the time and for the purposes therein mentioned; that there was a deed from Mrs. Marshall to Mrs. Helm, for the west half, and also a deed from Mrs. Helm to Collett, for the same, which last deed was never acknowledged.

After Collet took the house off the west eighty, the fencing was all taken off by some one, and not a rail left on the land. Ord went into possession under a claim of title from Love, and the rails disappeared from the west eighty after Ord went into possession. The improvement was first made on the west eighty in the spring of 1856 and remained there until the summer of 1867, except the house which was moved off in 1866.

The plaintiff also read in evidence, as color of title, what is called a tax deed from the register of lands to Mrs. Elizabeth Hacker and Joshua Simpson. This deed was made and dated on the 8th day of July, 1873.

The defendant on his part offered in evidence, as color of title to the land in question, a certified copy (from the record) of a deed from Love and Reynolds to David Ord, the landlord of defendant, which deed was dated the 14th day of May This copy of said deed was objected to by the plaintiff because it was not properly acknowledged; because the execution of the original was not proved, and the absence of the original was not accounted for. The defendant then introduced evidence tending to prove (the witness testifying being the agent of David Ord, the owner of the land who bought from Love in 1866, and took possession under deed and turned possession over to his son, defendant) that David Ord then resided in Indiana; that the original deed was not in possession of witness; that he presumed it was in the possession of David Ord in Indiana, who was the landlord of the The court sustained the objection to the record of the deed, to which the defendant at the time excepted.

The defendant also offered in evidence, as color of title, the record of a deed from one Condor to Love, and from one

Gardner to Condor, and from one Wilson to Gardner, and from the heirs of Ethan Hurlburt to Wilson. These deeds, or copies of deeds, were each objected to by the defendant, for the reason that none of the persons parties to said deeds were ever in possession of the land named, and that defendant is not connected therewith, and that the originals are not accounted for, and that they were not properly acknowledged. The objection was sustained to each of said deeds, and the defendant excepted.

There was also evidence tending to show that David Ord purchased the land in question of Love, in 1866, and that he and defendant under him, had occupied it ever since, claiming to be the owner, cultivating the same and paying taxes thereon.

The court at the conclusion of the evidence, at the request of the plaintiff, declared the law to be as follows, among other declarations of law given:

- 1. "The deed from Simpson to Parker, for the east half of the south west quarter, section twelve, township fifty-four, range twenty-two, was sufficient to give color of title; and if Parker took possession under the same, and afterwards sold the same to Mrs. Hacker, and such sale was accompanied by a transfer of possession, in fact, to her, and if Mrs. Hacker afterwards sold or transferred the same to Mrs. Cooper, and such sale was accompanied by a transfer of possession in fact to Mrs. Cooper, or if Mrs. Cooper went in by the consent and agreement of Mrs. Hacker, then such possessions may be connected together to make up the statutory period of limitation, provided such possessions were open, notorious, actual, adverse and continuous."
- 2. "The several possessions of Parker, Mrs. Hacker and plaintiff were sufficient to give title under the statute of limitations, in force at the time Parker went into possession, so far as the east half of the south west quarter, section twelve, township fifty-four, range twenty-two are concerned."
- 3. "Prior possession, the title having been shown to have passed from the General Government, is prima facie suffi-

cient to authorize a recovery, particularly when the defendant relies on mere possession, or where his possession was acquired by mere entry, without any color of right, or when he is a mere intruder; and if the plaintiff had the prior possession of the east half of the south west quarter, section twelve, township fifty-four, range twenty-two, and the defendant has shown neither title nor color of title thereto, then the plaintiffs are entitled to recover."

4. "If the plaintiffs were in possession of the east half of the south west quarter of section twelve, township fifty-four, range twenty-two, claiming the same in the right of the wife, and leased the same to Eisenham and others, and if plaintiff's tenants let Fisher in under them, and if Fisher let defendant in under him, or if defendant got in by, through, or under, any arrangement with the tenants of plaintiff's, and without plaintiff's consent, then the defendant is not at liberty to dispute plaintiff's title."

8. "Under the evidence in the case, the plaintiffs are entitled to recover the east half of the south west quarter of section twelve, town. fifty-four, range twenty-two."

9. "Under the evidence in the case the plaintiffs are entitled to recover the west half of the south west quarter of section twelve, town. fifty-four, range twenty-two."

The defendant objected to these declarations of law; and his objections being overruled he excepted.

Other declarations of law were given, and some asked on the part of the defendant, which were refused; but those copied are sufficient to show the theory on which the court decided the case.

The court found for the plaintiffs as to all of the land named, and rendered final judgment in their favor.

The defendant filed a motion for a new trial, which being overruled by the court, he excepted, and has appealed to this court.

It is first claimed by the defendant, that the court erred in permitting the plaintiff, John W. Cooper, to be examined as a witness in the case. It is assumed by the defendant that

the action is brought to recover solely in right of Mrs. Cooper, the wife of her co-plaintiff, and that the husband was only a formal party to the suit, and could not, therefore, testify on the trial of the case.

The case seems to have been tried on the theory that the husband was but a formal party, at least as to a part of the land; but I do not think that the petition is to be so construed. It is true that the petition states that plaintiff, Hannah Cooper, is the owner of the land; but it further states that by virtue thereof the plaintiffs were entitled to the possession of the land, and that the defendant entered, etc. Now as it is not shown that the land was the separate estate of the wife, the husband was entitled to the possession thereof, and might have sued to recover the possession without joining the wife; she would not be a necessary party in such possessory action; hence, in this case it was no error for the court to permit the husband to testify so far as his own interests were concerned. (Bledsoe vs. Simms, 53 Mo., 305; Hughes vs. Pierce, 49 Mo., 441; Tingley vs. Cowgill. 48 Mo., 291.)

It is next objected that the court improperly admitted in evidence, as color of title to the premises in controversy, a deed from Henry Collett purporting to convey the land to Mrs. Cooper, which deed was made and dated on the 28th day of August, 1870. There is no pretence in the whole case that the plaintiff was ever in possession of the land in controversy at any time after the execution of this deed; but it is conceded that defendant has had possession of the land ever since October 1866, nearly four years before the execution of the deed in question. The deed could afford no color of title to support a possession which was ended long before its existence, and was improperly admitted for any such purpose. (Crispen vs. Hannavan, 50 Mo., 536.)

It is next insisted that the court erred in excluding the record copy of a deed from Love to David Ord, offered by defendant to show color of title. The court committed no error in excluding the copy of the record of said deed. De-

fendant claimed as tenant of David Ord, and there is nothing to show that the original deed was not at said time under his control or in his possession; and the same thing may be said as to all other deeds offered by defendant. In fact it is not attempted to show that any possession had ever been held by any one under any of said deeds, except the one from Love to Ord.

It is next insisted that the court erred in making the first and second declarations of law asked for by defendant. It may be remarked, that in cases like this, where the case is submitted to the court for hearing, declarations of law are generally of but little use, except to show the theory on which the case was tried.

The first declaration of law given by the court, asserts that the deed from Simpson to Parker was sufficient io give Parker color of title if Parker took possession under said title: and that if Parker afterwards sold the same to Mrs. Hacker, and transferred to her the possession, and Mrs. Hacker afterwards transferred the same to Mrs. Cooper, and transferred the possession to her, and she entered with the consent of Mrs. Hacker, then such possession may be connected together to make up the statutory period of limitations, provided the possession was notorious, etc. If this declaration of law is intended to apply to the part of the land in actual possession, it is substantially correct; but if it is intended thereby to assert that the color of title by which Parker held will be sufficient of itself to give Mrs. Hacker and plaintiffs color of title, independent of any conveyance to them by which they respectively hold, it would be erroneous. It is true that it does not always require a written instrument to constitute color of title; but there must be some visible acts, signs or indications which are apparent to all, showing the extent of the boundaries of the land claimed, to amount to color of title. (Rannels vs. Rannels, 52 Mo., 108.)

The second declaration of law would be proper in the case if it had been confined to the land in actual possession of the parties. There is no doubt but the plaintiffs and those under

whom they claimed, had a sufficient possession and for a sufficient length of time to acquire title by the statute of limitations; but this title, like all other titles, may be defeated by the subsequent possession of another for a sufficient length of time to ripen into a title under the statute of limitations. (Crackett vs. Morrison, 11 Mo., 3.)

The third declaration given by the court, states that where the title has passed from the Government, possession is prima facie sufficient to authorize a recovery, particularly where defendant relies on mere possession, or where his possession was acquired without color of right, and he was a mere intruder; and if plaintiffs had the prior possession of the east half of said land, and defendant has shown neither title or color of title, then the plaintiffs are entitled to recover. This declaration is also wrong. Under the facts of this case it is clearly shown by the evidence that the defendant entered into the possession of the house and improvements on the east half of said tract of land in October 1866: that plaintiffs then warned him to leave the possession; that he refused to leave, claimed that he owned the land, and had entered as owner; and that he thus held the possession from sometime in October 1866, until September, 1870, when this suit was brought; that his possession was notorious; that he improved, used and cultivated the land in an open and notorious manner. It was also admitted that the land was military bounty land, and it is clearly shown that plaintiffs, and those under whom they claim, had not been in any manner in possession of the land for more than two years before the commencement of the suit. Under such facts the right of action having accrued against the defendant after the taking effect of the present statute, (Wagn. Stat., 915, § 1) the defendant is entitled to the protection of that statute, and his actual possession having, by virtue of that statute, ripened into a title, regardless of color of title, the plaintiff could not recover said part of said land.

The fourth declaration of law given by the court had no evidence to support it, and was therefore wrong.

The declarations of law given by the court all seem to ignore the defense of defendant, which is, that he had been in possession for more than two years; that the land was military bounty land, and that he was therefore entitled to hold that part of the land actually inclosed and in his actual possession, under the statute of limitations.

There was no evidence of color of title on the part of plaintiffs, as to the west half of said land during any period of their possession, and they could not therefore have held said part of said land under color of title.

The judgment in this case is in favor of plaintiffs, for the whole quarter section of land, including that in the actual possession of the defendant.

This judgment is, for the reasons aforesaid, erroneous, and will therefore be reversed and the cause remanded; the other judges concur, except Judge Sherwood, who is absent.

THE STATE OF MISSOURI, TO THE USE OF MARGARET HOUSE-WORTH, Respondent, vs. Hamilton Dill, John L. Gomel, Charles L. Biggars and John H. Glenn, Appellants.

1. Executions—Selections by married woman whose husband has absconded—Const. Stat.—Action against officer, how brought.—Under the statute concerning Executions (Wagn.Stat., 605, § 14), a married woman, whose husband has absconded, has a right to make the selections provided in § 11 of the same statute, and can maintain an action for the value of the property so selected when withheld from her by the officers: And such action is properly brought in the name of the State to her use. But she cannot, under § 14, recover from the sheriff the value of articles sold by him, which, under § 9, are exempt from execution. The act of March 3rd, 1873 (Sess. Acts 1873, p. 45), is not a legislative interpretation of § 14.

Appeal from Holt Circuit Court.

Thomas Parrish, for Appellants.

Duff & Collins, for Respondent. 28—vol. Lx.

Hough, Judge, delivered the opinion of the court.

The two material questions presented for consideration, by the record in this case, are, first, whether a married woman, whose husband has absconded, has, under the provisions of section fourteen of the General Statutes of 1865, in relation to Executions, the right to make the selections provided for in the eleventh section of the same act, and can maintain an action for the value of the property so selected, when it is withheld from her by the officers; and, second, whether such married woman can also maintain an action for the value of property, sold by the officer, which is exempt from execution by the terms of the ninth section.

The eleventh section is as follows: "Each head of a family, at his election, in lieu of the property mentioned in the first and second sub-divisions of the next preceding section, may select and hold, exempt from execution, any other property, real, personal or mixed, or debts and wages, not exceeding in value the amount of three hundred dollars."

Section 12. "It shall be the duty of the officers to apprise such person of his right to make such selection; and the same proceedings as to the selection, appraisement and sale of such property, shall be had as provided with reference to the selection, appraisement and sale of working animals, in the thirteenth and fourteenth sections of this act."

Section thirteen provides the manner of selecting, appraising and selling the working animals declared to be exempt by the second clause of the ninth section.

Section fourteen is as follows:

Section 14. "When the articles specified in the last preceding section shall belong to a married man and he, at the time the execution is levied or at any time before the sale under it, has absconded or absented himself from his place of abode, his wife may claim the said articles, and receive the same from the officer, and may, if the said articles are taken or withheld from her, in her own name, sue for and recover the same, or the value thereof; and in such suit shall not be required to give security for costs."

The thirteenth and fourteenth sections appear for the first time in the Revised Statutes of 1845, and in the order observed in the General Statutes of 1865. The eleventh and twelfth sections were enacted in 1847. The plaintiff could acquire no right to make the selection provided for in the eleventh section, by reason of anything contained in the fourteenth section, as that section, by its terms, relates only to the working animals mentioned in the "last preceding section," that is, the thirteenth section. It is evident, however, that the legislature intended, in the enactment of the eleventh and twelfth sections to confer upon the wife, when abandoned by her husband, all the rights secured to him, by those sections. Otherwise, there would have been no propriety in making any reference whatever to the fourteenth section, in the twelfth section. No provision is made in the fourteenth section as to the mode of selecting, appraising or selling, the working animals mentioned in the thirteenth section; but certain "proceedings" are authorized by the fourteenth section, with reference to the working animals mentioned in the thirteenth section, which the twelfth section declares shall be had, with reference to the selections allowed to be made, by the eleventh section.

It must be confessed that this meaning is not expressed in the twelfth section with any very great degree of perspicuity, but a liberal interpretation is always to be indulged in construing statutes exempting property from execution. (Megehe vs. Draper, 21 Mo., 510.) The instructions given by the court below, on this point, are in harmony with the views here expressed.

On the second point, the court below ruled, that the plaintiff was entitled to recover the value of certain articles of household and kitchen furniture, sold by the defendant, Dill, under execution against her husband, who had absconded, before the levy, which articles were exempt from execution under the provisions of the ninth section. In this ruling, we think the Circuit Court erred.

Such a construction of the fourteenth section cannot be sustained by the most liberal interpretation which can legitimately be placed upon it. Since the levy in question, and since the institution of the present suit, the legislature has, by an amendment of the fourteenth section, passed March 3rd, 1873, conferred upon the wife, when the husband has absconded or absented himself from his place of abode, the right to claim all the articles exempted by the ninth section, except those appropriate only to the husband's use, and to sue for and recover the same, or the value thereof, when withheld from her by the officer. Amendatory acts are sometimes viewed in the light of legislative interpretations and respected by the courts as such; but no such view can be taken of the act of 1873. Prior to the passage of this act, the wife's right of recovery was limited to the working animals mentioned in the thirteenth section, and to the articles allowed to be selected under the eleventh section. Since the passage of this act, and by its. terms, the wife's right, of claim and recovery, is limited to the articles exempted by the ninth section, with the exception above noted, without any right of selection under the eleventh section, and without any reference to the thirteenth section; the working animals there named, being included, of course, in the second subdivision of the ninth section. It will thus be seen that this act materially changes the scope of section fourteen, and cannot be regarded simply as a declaratory statute.

The action was properly brought in the name of the State, to the use of the wife, but in consequence of the error committed by the court, in its ruling as to the second point, the judgment which was for the plaintiff, will be reversed and the cause remanded; the other judges concur, except Judge Vories, who is absent.

McLaughlin v. First Nat. B'k of Kas. City, Mo.

LILBURN H. McLaughlin, Respondent, vs. First National Bank of Kansas City, Missouri, Appellant.

Injunction—Decree against one not party—Garnishment.—In a suit for injunction a decree against one not made a party, is unauthorized. Nor will such a suit without issue of execution or statutory process for attachment, warrant the summoning of garnishees.

Appeal from Ray Common Pleas.

John K. Cravens, for Appellant.

Esteb & Shotwell, for Respondent.

Sherwood, Judge, delivered the opinion of the court.

It is unnecessary to do much more than make a statement of this case.

The plaintiff brought his action against one Brown, to dissolve a co-partnership, then existing between them under the name of Brown & McLaughlin, and to settle the partnership accounts, etc. Pending this litigation in the Common Pleas Court, the plaintiff applied in vacation to the judge of that court by petition entitled as of the cause then pending, and referring thereto, praying, for certain grounds therein set forth, that Brown be enjoined and restrained "from drawing any money or deposit by him made in the name of J. G. Brown, or Brown & McLaughlin, with or in any bank, or other persons, and also enjoining and restraining any bank, or the officers thereof, or other persons, from paying any money or deposit to said Jno. G. Brown, and especially the First National Bank of Kansas City, Missouri, until the final termination of said cause, etc." Without any notice to the First National Bank, and without its being made a party to the proceeding, an injunction, as prayed, was granted, directed to Jno. G. Brown alone, enjoining him from removing any deposit or money made by him in his individual or in the firm name, belonging to said firm, and also "enjoining and restraining any bank or the officers thereof, or other persons, from paying any of said money or deposits to said Jno. G Brown; and especially the First National Bank of Kansas

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City," etc., etc. It was also ordered that a copy of the restraining order be served on the present defendant, which was done accordingly, in February, 1872.

In June, 1873, another copy of the restraining order accompanied by a summons, but without any petition, was issued from the court. The summons was directed to the sheriff of Jackson county, commanding him to "summon the First National Bank of Kansas City, Missouri, to be and appear, etc., to answer the petition of Lilburn H. McLaughlin for injunction heretofore served on you, in the case of said McLaughlin vs. Jno. G. Brown, et al.; and to show to the court the amount of money or property belonging to the said John G. Brown, heretofore restrained, in your possession," etc., etc. These papers were duly served.

At the next term the plaintiff filed certain interrogatories, such as are usually propounded to garnishees. These interrogatories were entitled Lilburn H. McLaughlin vs. The First National Bank of Kansas City, and this is the first paper in the record thus entitled. The Bank answered under oath, showing the possession of a certain sum of money deposited by Brown, and this was undenied until the next term, when it was denied by a plea entitled "Lilburn H. McLaughlin vs. Jno. G. Brown, and The First National Bank of Kansas City, Mo., as garnishee on injunction of said Jno. G. Brown." There being no further appearance on the part of the Bank, a trial was had on the answer to the interrogatories and the plea thereto, and a judgment rendered for a sum far in excess of that admitted to be due.

This judgment was rendered in a cause entitled "Lilburn H. McLaughlin vs. The First National Bank of Kansas City, Mo., by injunction." Upon what ground this judgment is rendered, the record does not declare; nor is it material to know. It is sufficient to say that the above recited proceedings are wholly unauthorized by law, and that the court never acquired any jurisdiction to render any judgment whatever against the defendant.

The judgment is reversed; the other judges concur.

EMILIE D. HOLTHAUS, et al., Respondents, vs. Charles Horn-BOSTLE, Appellant.

 Equity—Bill to enjoin execution sale—Plaintiff in execution made sole defendant.—Where property is seized on execution, a bill to enjoin the sale which makes the plaintiff in execution the sole defendant, is as effectual as though the officer were made party defendant, and included in the decree.

2. Married woman may hold personal property exempt from execution, and without trustee.—In equity a married woman may hold personal property to her sole and exclusive use, without the intervention of a trustee, and will be protected therein against the claim of the husband and his creditors, where the deed is not made in fraud of their rights. And her right is not in any wise limited to stocks, etc., referred to in § 19, ch. 94 Wagn. Stat. p. 936. And such gift from a third party will not be affected by the insolvency of the husband.

The property may be given by parol. But proof of the gift must be clear and positive, and free from any suspicion of fraud.

Appeal from Buchanan Circuit Court.

Judson, Barnard & Molter, for Appellant.

I. By the common law, the husband, by marriage, acquired an absolute title to all personal property belonging to the wife, and to all personal property subsequently acquired by the wife during coverture. (Reeves Dom. Rel., 1.)

The common law has been modified by the statute exempting from attachment or levy of execution for the sole debts of the husband, the rents, issues and products of the real estate of any married woman (Wagn. Stat., 935, § 14); also personal property consisting of stocks and bonds, given by a parent to a daughter. (Wagn. Stat., 936, § 19; Fiske vs. Wright, 47 Mo., 351; Woodford vs. Stephens, 51 Mo. 443.) But the modification extends no further.

II. There is no pretence in plaintiffs' petition, and no testimony at the trial, of the creation of a trust. They claim the property levied upon as the separate property of the wife, on the sole ground of the naked gift of \$600 given to Mrs. Holthaus by Henry Lipps in 1870, when the business was first entered upon. The testimony does not show a state of facts from which a trust can be implied.

III. While this is in form an equitable action by the wife to protect her separate estate from her husband's creditors, the

evidence shows it to be in fact an effort on the part of the husband to secrete and protect his own earning from the payment of his debts.

F. T. Ledergerber and Bennett Pike, for Respondents.

I. A trust may be created by parol. (6 Bush., [Ky.] 328;
2 Metc., [Ky.] 509;
37 Barb., 49;
3 Paige Ch., 440;
9 Ind.,
347;
44 Mo., 132;
Sto. Eq. Jur., [ed. of 1873]
§ 972, referred to in 46 Mo., 117;
23 Iowa, 577.)

II. The fact that the wife employed her husband in the business being fully explained, is no longer in the case so as to affect plaintiff's right. (33 N. Y., 418; 44 Mo., 343; 6 Penn., 383.)

III. The agreement is good, unless it be shown to be fraudulent. (51 Ill., 417; 39 Barb., 61; 47 Penn., 220, 227; 50 Id., 266; 65 Id., 191.)

In equity the intervention of trustees is not necessary to the validity of a gift from husband to wife, (46 Mo., 81); and such gift may be made by a third party, notwithstanding the insolvency of the husband (8 Paige Chy., 167); and may be used in business for which he may be her agent, etc. (33 N. Y., 518.)

Hough, Judge, delivered the opinion of the court.

The complainants are husband and wife, and obtained, in the Circuit Court of Buchanan County, an injunction perpetually restraining the defendant from proceeding to sell under an execution in his favor, and against the husband, certain personal property claimed by the wife, as her separate estate.

It appears from the record, that the complainants were married in 1862, and lived in Atchison, Kansas, and that the husband, who was a baker and confectioner, was then possessed of considerable real estate and personal property; that in the year 1870 he failed in business, and after surrendering all his property, real and personal, for the benefit of his creditors, was still in debt to the amount of twenty-five hundred dollars, and being without the means of supporting his family,

his wife, Mrs. Holthaus, who then had three children, went to the house of her step-father, Henry Lipps, in Atchison, who provided for them until March, 1870, when he purchased and put her in possession of a bakery, confectionery and icecream saloon in the city of St. Joseph. This property, which was all personal, cost about seven hundred dollars.

At the time of this gift to his step-daughter, Lipps, who knew that her husband was in debt and insolvent, was careful to inform them both that it was intended as a provision for the support of Mrs. Holthaus and her children, and was for her separate use and benefit, and that neither the property, business nor profits should ever be claimed, interfered with, managed or controlled by the husband. This arrangement was acquiesced in by the husband, and the purchase was made with that understanding, and he afterwards worked in the bakery for his wife, and received a stipulated sum for his services, no part of which earnings of his went into the business conducted by her. These facts distinctly appear, and are not contradicted.

Soon after his failure, Holthaus executed, jointly with his former partner, a note to the defendant, for the sum of one-hundred and forty dollars, for goods purchased by them in their business, several years previously. Sometime in June, 1871, the defendant obtained judgment against the complainant, Emilie Holthaus, on this note, and in August following had an execution issued and levied upon a portion of the property given, as before stated, to Emilie D. Holthaus, by her step-father, Lipps. The defendant offered no testimony.

No questions as to pleadings or evidence are saved in the record, and the case comes before us solely on the propriety of the decree awarding the perpetual injunction.

A court of equity is undoubtedly the tribunal to which a married woman should appeal for the protection of her separate estate from the creditors of her husband, and a decree against the plaintiff in the execution, as sole defendant, would be as effectual as though the officer having the process had

been made a party and included in the decree. (Olin vs. Hungerford, 10 Ohio, 269.)

It is contended by the appellant, that the property levied upon was subject to seizure and sale under the execution against the husband, by reason of the common law rule, that the husband, by marriage, acquires an absolute right to all the personal property in possession, belonging to the wife, and all subsequent acquisitions by her of choses in possession.

The statute exempts from levy under execution against the husband, except for debts contracted by him for necessaries for his wife and family, the rents, issues and products of her real estate, and all moneys and obligations arising from its sale, and any stocks and bonds of any kind, given by a parent to a daughter, together with the proceeds thereof. These exemptions include only such personalty of the wife as would not be entitled to protection in equity, and which would not, but for such enactment, be secured to the wife against the claims of the husband, or his common law right to reduce the same to possession.

It is plain that the property seized in this case does not fall within any of these statutory exemptions, and it is argued that it is therefore subject to a sale as the property of the husband. But it must be remembered that it is an established doctrine of courts of equity, that a married woman is capable of taking personal estate, to her own separate and exclusive use, and that such property will be protected against the marital rights and claims of the husband, and of his creditors also. (Woodford vs. Stephens, 51 Mo., 447; 2 Sto. Eq., §§ 1378, 1380.)

Nor is it necessary that such property should be either conveyed or transferred to a trustee to hold for her. Though it should, in fact, be in the hands of the husband, he will be held to be a mere trustee for her. (2 Sto. Eq., § 1380.) Nor need the creation of such estate in personalty be evidenced by writing, as in the case of land. While prudence would dictate that it should be so evidenced, and public policy might seem to require it, yet, as the law now is, a separate estate in personal

property may be created in a married woman, by a parol gift. (Finley and wife vs. Roll, 2 Metc., [Ky.] 509: Walton vs. Broaddus, 6 Bush., 328.) In every such case, however, the proof must be clear and positive, and free from any suspicion of a fraudulent combination for the concealment of the husband's property from his creditors. The indebtedness and insolvency of the husband, however, are matters of no moment, when the gift is clearly shown to have proceeded from a third person, and not indirectly from him. These facts furnish the very best reason for creating such estate and frequently constitute the only reason for such donations from generous relatives and friends, for the benefit of wives of unfortunate, or improvident and dissolute husbands, and their children. Genuine beneficence of this kind there is every inducement to encourage and uphold. It is partly from such considerations as these, that what is known as the wife's equity to a settlement, arises, when she receives personal property during coverture, without any limitation to her separate use. (Wickes vs. Clark, 8 Paige, Ch., 161.)

The gift, in this case, having been clearly established to have been made for the separate use of Mrs. Holthaus, by her step-father, and the husband having agreed to so regard it, before and at the time of the gift, and having ever since acquiesced in it, and as it does not appear that the character impressed upon this property at the time of its acquisition, has, at any time since, been lost or in any way altered, it is our duty to preserve its enjoyment to her, according to the terms of the gift.

The decree of the Circuit Court will therefore be affirmed; all the judges concur except Judge Vories, who is absent.

JULIA A. BRETZ, Respondent, vs. WILLIAM M. MATNEY, EXECUTOR OF JOHN BRETZ, DEC'D, for Appellant.

- 1. Wills—Dover, devise in lieu of—Acceptance or rejection by widow.—
 Where a will contains a devise to the widow, in lieu of dower, under our statute concerning dower, (Wagn. Stat., 541, § 16) no acceptance of the devise is required; if nothing is done within a year after probate, the law presumes her acquiescence; but she may, at any time within the year, reject the will.
- As our law does not provide for her acceptance or election, such acceptance or election, if made, would amount to nothing, and she could, at any time within the year, reject the will, notwithstanding. And even where the will, in terms, requires "an acceptance" of its provisions, the rule is the same.

Appeal from Buchanan Circuit Court.

B. R. Vineyard, with A. H. Vories, for Appellant.

I. The will required an election, and when the widow elected to take under the will it provided that the bequest should "be in lieu of her dower in the whole estate" of the deceased. (Pemberton vs. Pemberton, 29 Mo. 408; Brant's Will, 40 Mo., 277 (at bottom); 2 Sto. Eq. Jur., § 1075—1123 and cases cited; Wagn. Stat., 541, §§ 15, 16.)

II. The status of the rights of the widow under the will and in the estate of her deceased husband, was fixed when she elected to take under the will, and could not be changed by a subsequent renunciation of the provisions of the will.

There is no fraud or mistake set up or shown. She elected with full knowledge of the facts, and she is bound by that election. If she elected rashly, it was her fault, not that of the law. (Davis vs. Davis, 11 Ohio St., 386.) This case, decided in 1860, is directly in point. (Light vs. Light, 21 Penn. St., 407; Van Orden vs. Van Orden, 10 Johns., 30; Brant's Will, 40 Mo. 277.)

III. It is true that the widow, under the statute (Wagn. Stat., 541, § 16), might have withheld her election for any time short of a year after the probate of the will; but the statute did not design to give her the right of accepting and rejecting the provisions of the will as many times as she saw fit during that year. It was the intention of the legislature

to give her ample time to ascertain the condition of the estate, and the nature of the bequest to her, before compelling her to decide whether she would choose the bequest or reject it; but when she once made her election, unless she was imposed upon or acted through mistake, it was designed that her election should be final. (Davis vs. Davis, 11 Ohio, 386; Light vs. Light, 21 Penn. St., 407; Van Orden vs. Van Orden, 10 Johns., 30.)

Tutt, with Loan, for Respondent.

I. John Bretz, by his will, could not nullify the provisions of the statute. The statute allowed her twelve months after the probate of the will, in which to renounce the provisions of the will in her behalf.

The law secured her this right of renunciation for twelve months after the probate of the will, and this right under the law, cannot be abridged by any conditions that her husband might insert in his will.

As a matter of law, she took her dower under her husband's will, unless she renounced the provisions made for her within one year. But if within one year she elected to renounce the provisions made for her, she was then entitled to her dower under the law. (Watson vs. Watson, 28 Mo., 300.)

II. There was no consideration for the acceptance obtained from her by Matney.

III. Nor is there sufficient to work an estoppel in pais. There is no evidence in the record to show that the estate of Bretz, or of any one interested in it, would be prejudiced by allowing Mrs. Bretz to disregard it. No burdens would be cast upon the estate or them, that were not imposed upon them before it was executed, and they have given nothing to be relieved of the burden.

To establish an estoppel in pais, there must be some act or admission inconsistent with the claim set up, action by the parties, upon such act or admission, and injury resulting therefrom if such act or admission be allowed to be disregarded.

These elements do not concur in this case. (See Taylor vs. Zepp, 14 Mo., 482; Newman vs. Hook, 37 Mo., 207.)

NAPTON, Judge, delivered the opinion of the court.

This case involves the construction of the will of John Bretz, and of our statutes concerning Wills and Dower.

That portion of the will of Bretz concerning his widow is this: "It is my will that my wife, Julia Ann, may keep all that portion of the tract of land upon which I live, that lies east of the road running north through said tract, which will be about thirty-five acres, including all the buildings, so long as she remains my widow, or so long as she may live, but whenever she should marry again, or whenever she should die, then my executors shall take possession of it and sell it, as any other land. In addition to the thirty-five acres of land just mentioned, it is my will that she shall have \$1,000, to be paid to her in three annual instalments. She is, however, to commit no waste upon the premises, and is to pay the taxes promptly that may be assessed against it. The use of the thirty-five acres of land and the \$1,000, above mentioned, are to be in lieu of dower in my whole estate, which she is required to relinquish before she is authorized to keep the land above mentioned, as well as the one thousand dollars mentioned; but should she decline accepting the foregoing bequest or proposition, then, it is my will that she may select and take a child's part, which, however, is to be in lieu of dower as before mentioned. In either case, she shall be required to file her acceptance in the Probate Court within one year after my death, or before she can inherit anything."

This will was probated 25th June, 1873; on the 23rd July,

1873, Julia A. Bretz filed the following writing;

"To the Hon. J. P. Pettigrew, Judge of the Probate Court of Buchanan county. You are hereby notified, that I hereby accept the bequest and legacy made to me by my late husband, John Bretz, in his last will and testament, filed for probate in your office, which said bequest and legacy embrace the use of the home place, of thirty-five acres, of said Bretz, during my natural life or widowhood, and a gift of \$1,000, to be paid in three equal annual instalments, and in consideration of said bequest and legacy, I hereby accept the terms and conditions

of said bequest and legacy so made in said will, and hereby relinquish all my right of dower, and all other claims of whatsoever kind I might have in said estate of said John Bretz, deceased, under the laws of the State of Missouri, as his widow. In witness of all which, I have hereunto set my hand and seal, this 23rd July, 1873. Julia A. Bretz."

In November, 1873, the widow filed in the Probate Court, her non-acceptance of the will, and elected to take a share in the estate of her deceased husband, equal in all things to her dower interest in said estate. This was within the year, and her right to renounce the will was allowed, notwithstanding her previous acceptance; and the only point in the case is whether the court did right in allowing her renunciation of the will, after she had accepted its provisions; the renunciation having been made within the year, in accordance with the 15th and 16th sections of the act concerning Dower. (Wagn. Stat., 541.)

The 15th section declares, that "if any testator shall, by will, pass any real estate to his wife, such devise shall be in lieu of dower out of the real estate of the husband, whereof he died seized, or in which he had an interest at the time of his death, unless the testator, by his will, otherwise declared."

By the 16th section it is provided, that "in such case the wife shall not be endowed in any of the real estate whereof her husband died seized, or in which he had an interest at the time of his death, unless she shall, by writing, duly executed and acknowledged, as in cases of deeds for land, and filed in the office of the court in which the will is proven and recorded, within twelve months after the proof of the will, not accept the provisions made for her by said will."

Under our statute, no acceptance by the widow is required; if nothing is done within the year by her, the law presumes her to have acquiesced. But she may, at any time within the year, reject the will.

In this case the rejection of the will is formally made within the time fixed by the statute.

The only objection to this renunciation is, that the widow had previously entered, in the Probate Court, a formal acceptance of the provisions of the will. No such acceptance was required by our statute, nor was any election between the will and the law to be made. Our law says, the widow shall be presumed to acquiesce in her husband's will, unless within twelve months after its probate she chooses to renounce. The year is given to her to renounce, for reasons which are obvious. Her acceptance, however repeated, amounts to nothing. She has a year within which to make up her final intention, and there is nothing in our statute to deprive her of this right.

The case of Davis vs. Davis, 11 Ohio, 386, is relied on to show that an election, once made by a widow, is irrevocable. This case was decided under a statute of Ohio, essentially different from ours. The judge who delivered the opinion of the court seems to assume that under the Ohio statute, the widow had a year within which to make an election, and, therefore, decides that when such election was once made, in the form prescribed by law, without fraud or imposition, such election was binding on the widow.

The statute of Ohio required the officers to explain to her the provisions of the will and her rights under it. Under our law, no form of acceptance of a will is prescribed, nor is any explanation of the will required.

And the case of Light vs. Light (21 Penn. St., 413) is referred to as supporting the position, that an election by a widow to take under the will of her husband is an estoppel against her claiming dower, and that such election is binding on her, there being no fraud.

We do not assume to controvert the propriety of these decisions, under the statutes of the States where they were made, but our statute gives the widow twelve months within which she can reject her husband's will, and requires no formal election between the will and the law; and, we suppose, she is entitled to the twelve months allowed her by statute, although she may formally accept the will every day in the year pre-

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vious to the last. Such acceptance is purely voluntary, and made within the period during which our statute holds her irresponsible for her acts.

Nor can the will of the husband impose an obligation which the law does not impose. Our statute is designed to confer privileges on widows denied to men; and these privileges are conferred to prevent impositions upon them through their ignorance of law or the promptings of impulsive affection.

The case in Pennsylvania seems to be based on the maxim that ignorantia legis neminem excusat; but this maxim our statute ignores or suspends, in regard to widows, for a definite period after the death of their husbands.

Judgment affirmed; the other judges concur.

THOMAS D. EVANS, Plaintiff in Error, vs. LUTHER T. FORE-MAN, Defendant in Error.

1. Promissory note, alteration of-Intent of party making, immaterial-Ratification, etc .- A material alteration in a note by one of the parties, as by adding the words "after due, ten per cent.," will release a party not ratifying or consenting to the change. And the rule holds even though the alteration be made with honest intent, in order to conform the note to the agreement of the parties. The alteration vitiates the note regardless of the intention.

2 Promissory note-Payments on after alteration-Effect of .- Partial payments after the alteration of a promissory note, and with full knowledge of

the fact, will be held as a ratification of the change.

3. Promissory note-Alteration made in presence of party his own act, when .-An alteration made in the presence and with the consent of a party thereto will be held, in law, as his own act.

Error to Linn Circuit Court.

C. W. Bell, for Appellant, cited in argument 2 Pars. Bills & N., pp. 570, 571; Hervey vs. Hervey, 15 Minn., 357; Nevins vs. DeGrand, 15 Mass., 436; Kountz vs. Kennedy, 63 Penn. St., 187; Drakes vs. Fray, 7 Bush Ky., 273.

George W. Easley, with Alex. W. Mullins, for Defendant in Error, cited in argument, 1 Greenl. Ev., § 565; 2 Pars. 29-vol. Lx.

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Notes & B., 545; Haskell vs. Champion, 30 Mo., 136; Britton vs. Dierker, 46 Mo. 591; Holmes vs. Trumper, 22 Mich., 427; 7 Am. Rep., 661; Whitmer vs. Frye, 10 Mo., 348; Fulmer vs. Seitz, 68 Penn. St., 237.

Sherwood, Judge, delivered the opinion of the court.

Action on promissory note. Plea, non est factum, accompanied by special and explanatory statement to the effect that the note was signed by defendant as surety of his co-defendant Johnson, and that after issue the instrument received an unauthorized alteration by the addition thereto of the words; "after due 10 per cent." Suit discontinued as to maker Johnson. There was no denial of the allegation of the petition that certain payments on the note sued, had been made by the defendant.

The reply alleged that the note, by mistake, was not drawn in accordance with the intention of parties; that the correction was made in conformity to such intention, and that defendant, when made aware of, ratified the act.

There was evidence in support of the plaintiff's and of the defendant's allegations; that of the former showing that, discovering the alleged mistake, plaintiff had mentioned the matter to the maker, who, in the absence of the surety, and in good faith, had added the additional words, and that, being informed of the alteration, defendant had approved thereof and promised to pay and offered land in payment of the note.

It would be a hopeless task to endeavor to reconcile, and a fruitless one to even compare the numerous conflicting decisions, and oftentimes fine spun distinctions, of which the alteration of promissory notes and the legal consequences flowing therefrom, have been the prolific theme.

This court, in the case of Haskell vs. Champion (30 Mo., 136) became the enunciator of a doctrine, on this point, which for freedom from embarrassing complications, facility of its application, and as preventing fraud even in its incipient stages, by putting an absolute interdict on all unauthorized tamperings—placing thereby the holders of paper under the

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strong bonds of pecuniary self-interest to keep it entirely intact—commends itself to our cordial approbation,

Judge Scott, in delivering the opinion of the court in that case, remarks with much force: "As the nature and purposes of contracts require that they should pass to the hands of those who are interested in altering them, to the prejudice of those who execute them, and as the facilities for making alterations are numerous and the difficulty of proving them great, all means should be employed to impress on the minds of those who are in possession of such paper a sense of its inviolability."

The Supreme Court of Pennsylvania, has pursued in this regard, the same line of decision as our own court. In Moore vs. Lessee of Brickham & West (4 Binn., 1) it is said: "Without the consent of all parties, the most trifling alteration cannot be made."

In Marshall vs. Gougler, (10 Serg. & R., 164), the question at issue was whether the witnesses had put their names to the original bill by the procurement of the obligee, and in the absence of the obligors, or did they intend to put their names to the assignment to authenticate that, and by their own mistake, or the mistake of the obligee, subscribe their names to that they never designed to attest; and there the appellate court condemned the charge of the lower one, which told the jury in substance that if the names of the witnesses were procured to be put to the note by the obligee, with a fraudulent intention, with design to injure, etc., it would avoid the note, but the note would not be void if the procurement of their signatures was without such intent, remarking: "But such is not the law, for whether there was a design to defraud or not, however the act might be done in ignorance and in innocence, still this falsified authentication of the instrument would avoid it."

In Miller vs. Gilleland, 19 Penn. St., 119, speaking of these alterations, the court says, * * : "To tolerate an attempt to reform a security by the rash and it may be secret act of the creditor, would change the position of the debtor and subject him to risk and trouble which ought not to be im-

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posed on him. It would compel him to encounter the perils of parol proof, not only to establish the fact of alteration, but to show what the instrument was; and that done, to meet the creditor's proof of bona fides."

To the same effect are Neff vs. Horner, (63 Penn. St., 327;) Fulmer vs. Seitz (68 Penn. St., 237), and are on all fours with the case at bar.

In Fulmer vs. Seitz, just cited, the case of Kountz vs. Kennedy, 63 Penn. St., 187, relied on by plaintiff, is spoken of thus: "That case is a very close one, and was decided doubtingly on its peculiar circumstances, one of our number expressly dissented and I gave my own assent with hesitation."

In England and New York, the rule, that a material alteration vitiates, whether done innocently or fraudulently, prevails. (Warrington vs. Early, 2 Ellis & B., 763; Gardner vs. Walsh, 5 Ellis & B., 82, [overruling Cotton vs. Simpson, 8 A. & E., 13]; Chappell vs. Spencer, 23 Barb., 584, and cases cited; Woodworth vs. Bank of America, 19 Johns., 391.)

It will be observed that the cases just cited do not proceed to the length of those in Pennsylvania; but the latter are thought to assert the better, as they certainly do the safer, doctrine.

The alteration in the note sued, having been made in the presence and with the privity of the plaintiff, must be received in the same light as to the results consequent therefrom, as though done with his own hand. (Miller vs. Gilleland, and Neff vs. Horner, supra.)

It has not been intended by the foregoing remarks to give any intimation as to what the effect would be, were the alteration a result purely accidental, or caused by a stranger's spoliation. But it is designed distinctly to assert that if mistakes do arise in the preparation of written instruments, that aside from consent of all parties interested to the needed correction, the courts of the country, alone, can furnish adequate redress; and that we will not give sanction or countenance to the attempts of an interested party to effect by his own hand the desired reformation; as an honest blunder of this sort, if

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upheld in one instance, might necessitate sanctioning an alteration having that appearance, but which from the infirmity of human testimony, might be grossly otherwise.

Under the issue raised by the pleadings, the only material question left to the triers of the fact was that presented by the first instruction given for the plaintiffs and by the first and second instructions given for defendant, embodying the theory that though the surety gave no prior authorization to the addition of the words "after due 10 per cent.," yet if having full knowledge of the alteration, he yielded assent thereto, this would be equally as binding as if consented to in the first instance, and that in the absence of any such ratification the note as to him was void.

These instructions placed the matter at issue with unexceptionable fairness before the jury.

As to those instructions, asked on the part of the plaintiff, to the effect that although the note was altered without defendant's knowledge or consent, yet, if the change was made in order to conform the contract to what all the parties had agreed, and without any fraudulent intent, such alteration would not invalidate the note, they were properly refused; and the principle asserted in them has been condemned in our previous remarks, as well as in the cases cited from Pennsylvania. But there was an error committed in the trial of this cause which we cannot regard as altogether "harmless." The court refused to instruct the jury that the pleadings admitted that the defendant had made certain payments on the note. The plaintiff had a right to demand that the jury be told just what the parties had admitted of record. This admission was an important one, constituting a link in the chain of plaintiff's evidence, which, if supplemented by sufficient testimony showing such payments to have been made with full knowledge of the alteration, would have made out his case. It may have been that the verdict would have been unchanged, had the second instruction, stating the admission, been given; but this is a matter beyond the range of possibility to determine. Therefore, the judgment will be reversed and the cause remanded. All concur, except Judge Vories, absent.

Samuel S. Boyd, et al., Respondents, vs. Alfred Jones, et al., Appellants.

 Sheriff's sale—Combination of bidders will not vitiale unless designed to depress bids.—Judgment creditors may agree among themselves that one of their number shall at the execution sale bid for all, and for an amount sufficient to indemnify themselves. And such a combination will not vitiate the sale unless made for the purpose of depressing the bids.

Evidence—Declarations of vendor of personal property after sale—When competent as against vendee.—The declarations of a vendor of personal property made by him while in possession after sale, are receivable against the vendee, as part of the res gesta, to make out a case of fraud against his creditors.

- 3. Evidence—Combination of parties to a deed to defeat creditors—Declarations of grantor after date of deed—Competent as against grantee, when—Combination must be shown, etc.—Generally the declarations of a grantor, made after the execution of his deed, cannot be made use of to defeat it; but the rule is otherwise where the parties to the instrument have entered into a common scheme to hinder and delay the creditors of the maker, and the declarations are made by the grantor while engaged in the prosecution of that plan. But in such case the common design and undertaking must first be proved by evidence aliunde, before his declarations are admissible. The fact that the grantee subsequently assents to and joins in the fraudulent undertaking, will not render such declarations of the grantor, made prior to their confederation, competent to overthrow the deed.
- 4. Fraudulent conveyances—Transfer of all one's property except that exempt from execution—Presumption arising from.—The fact that one being heavily indebted conveys away all his real and personal property, "except such as is exempt from sale under execution," is a circumstance tending to show fraud in the grantor.

Appeal from Ray Circuit Court.

This suit seems to have been commenced on the 25th day of October, 1867, and afterwards taken, by change of venue, to the Circuit Court of Ray county, and was there tried on an amended petition.

Hall & Oliver Vories and others, for Appellants.

I. Statements made by a party after assignment are not admissible to affect the title of the assignees. (Stewart vs. Thomas, 35 Mo., 202; Enders vs. Richards, 33 Mo., 598; Garland vs. Harrison, 17 Mo., 282.) The admissions of a grantor in a deed of trust, after its execution, are admissible in favor of the cestui qui trust, though not against him; and

such admissions are not competent against the grantee or assignee. (McLaughlin vs. McLaughlin, 16 Mo., 242; Weinrich vs. Porter, 47 Mo., 293.)

II. The deed from McGirk to Thomas J. Jones, for the land in controversy, under the deed of trust, was improperly excluded as evidence offered by defendant Jones, to prove his title. It was *prima facie* good until attacked for fraud. But the court pronounced it fraudulent and void before the evidence was heard, or any offer to impeach it. This deed was dated September, 1869, and respondent's amended petition was not filed until 1871.

III. The evidence shows an agreement entered into on the day of the sale of the land by the sheriff, on the part of the respondents, to purchase the property by one for all, and to refrain from bidding, which operated to repress bidding, and was a fraud upon the debts. (Wooten vs. Hinckle, 20 Mo., 290; Neal vs. Stone, 20 Mo., 294; Hook vs. Turner, 22 Mo., 333; Stewart vs. Severance, 43 Mo., 322.)

H. Wallace & John E. Ryland, with Doniphan & Garner, for Respondents.

I. The declarations of Alfred Jones in regard to his son Thomas, whilst in California, after the date of the deed of trust, July 23, 1863, were competent against Thomas J. Jones, in connection with the other evidence in the case, showing a conspiracy, or common purpose entered into between Alfred Jones and Thos. J. Jones, or acquiesced in by Thos. J. Jones, to cover up the property of Alfred Jones and defraud his creditors. (Weinrich vs. Porter, 47 Mo., 293; Waterbury vs. Sturtevant, 18 Wend., 353; Cuyler vs. McCartney, 33 Barb., 165; Peck vs. Crouse, 46 Barb., 151; Gamble vs. Johnson, 9 Mo., 605.)

II. The court below properly excluded the pretended deed made by Isaac M. McGirk, on the 9th day of September, 1869, as trustee, to Thomas J. Jones, for the lands in controversy, on private sale, during the pendency of this suit and two years after the suit was commenced, not for cash, as author-

ized by the deed of trust, but for depreciated notes and choses in action, impeached as partly paid, and partly fraudulent and fictitious, in this suit, then pending, to which both McGirk and Thomas J. Jones were parties and had answered. (O'Reilly vs. Nickerson, 45 Mo., 160, 165, 166; 1 Sto. Eq. Jur., §§ 405, 407; Murry vs. Ballou 1 Johns. Chy., 566; Stone & Warren vs. Connelly, 1 Metc., [Ky.] 655; Frem. Judg., 228; Cord Leg. Eq. Rights Mar. Wom., Ch. XLIV, p. 597, § 1043.)

III. The pretence set up in the amended answer of defendants, Alfred Jones and Thomas J. Jones as to an alleged conspiracy and combination at the sheriff's sale, at which plaintiffs purchased the lands, in November, 1855, to depress the price of the lands and stifle bidding, is entirely unsupported

by the evidence.

Plaintiff had a clear right to agree to bid on these lands, and make them bring the amount of their debts, or buy them. (Stewart vs. Severance, 43 Mo., 322.)

Vories, Judge, delivered the opinion of the court.

By the petition in this case, it is stated that in the year 1862, Alfred Jones was indebted to each of the plaintiffs as well as others, in various sums of money, amounting in the aggregate to about two thousand dollars, for which said several sums he executed to the respective parties his several promissory notes; that in the latter part of the year 1863, suits were brought on said notes and judgments recovered thereon in the Lafayette Circuit Court, in the month of May, 1864; that after the rendition of said judgments, executions were duly issued thereon and delivered to the sheriff of Lafavette county, by virtue of which, said sheriff levied upon and seized, with other property, the following lands situate in said county, as the property of said Alfred Jones, to-wit: the west half of the south west quarter of section twenty-five, in township fifty-one of range twenty-seven, except twelve acres taken off the east side thereof; also twelve acres of the west half of the south west quarter of said section; also twenty-eight acres off the

west side of the east half of the south west quarter of said section; that afterwards said sheriff in due form of law, on the 22nd day of November, 1865, sold said lands by virtue of said executions and levies, at which sale the plaintiffs became the purchasers of said lands, at and for the sum of \$---; that said sheriff thereupon executed and delivered to plaintiffs a deed to said land in due form of law.

The petition alleges that on the 23rd day of July, 1863, the said Alfred Jones, with a view to defraud, hinder and delay plaintiffs and other creditors of said Jones, by his deed of that date, commonly called a deed of trust, conveyed or professed to convey to the defendant, Isaac M. McGirk, as trustee, said tracts of land, together with a large quantity of personal property, for the pretended purpose of securing the payment of certain debts or pretended debts therein stated to be due from said Alfred Jones to various persons therein named, towit: to Isham and Elizabeth Martin the sum of \$850, with interest; to Thomas J. Jones the sum of \$5,350.00, by virtue of a note alleged to be dated the 5th day of October, 1857; to Washington Talbott the sum of \$715; to one - Rucker the sum of \$200; and to one - Russell the sum of \$100; that said deed of trust was duly recorded and was executed. made and contrived by said Alfred Jones, to defraud, hinder and delay plaintiffs and other creditors of said Alfred Jones in the collection of their debts against said Alfred Jones, and to cover up his property from said creditors; that the intent to defrand was contrived by including, in said deed of trust, some real debts of said Jones, with other pretended and fictitious demands against him, and thus to incumber said land and property with some valid debts of an inconsiderable amount compared with the whole of the indebtedness named in the deed, intending at the time to pay the holders of said valid debts and get the same under the control of himself and family, and keep the same, together with said fictitions debts, as apparent liens to cover said property so as to hinder and delay his real creditors, and thereby secure the use and benefit of said property to himself without the payment of his

just debts; that there was, and is in reality, no such debt due from said Alfred Jones to Thomas J. Jones, as that described in said deed of trust, as a debt of \$5,350.00; but that the same was gotten up as a device to cover up said property as aforesaid; that there was no consideration for said note: that Thomas J. Jones is a young man, a son of said Alfred, and controlled by him, and was at the time wholly destitute of means; that the debts named in said deed of trust as being due to said Washington Talbott, and to Isham and Elizabeth Martin were long since paid with the means of said Alfred Jones, through one William H. Day and other persons, and that a pretended and fictitious assignment, of the claims and judgments which had been rendered thereon against said Alfred Jones, was, by the direction of said Alfred, made to said William H. Day, as trustee for the wife of said Alfred Jones, for the purpose of keeping said property covered by the apparent lien of said pretended debts after the same had been fully paid; that said Day had no interest in said debts, but was used by said Alfred Jones and wife for the purpose of covering up his property and withholding the same from his creditors; that the debts, named in said deed of trust, as being due from said Alfred Jones to said Rucker and Russell were either originally pretended and fictitious, or have long since been paid by said Alfred Jones, and have been fraudulently assigned to said Day for the same purpose for which the assignment of the other debts were made; that whatever just or real debts were named in, or secured by, said deed of trust have been fully paid as aforesaid; that the only debt named in said deed of trust which has not been paid, is the pretended debt of \$5,350.00 to said Thomas J. Jones, which is pretended and fictitious.

It is further charged by the petition, that by the said deed of trust and other conveyances made by said Alfred Jones, about the same time, all the property of the said Alfred Jones subject to execution under the laws of this State, was conveyed away and covered up from plaintiffs and other creditors, leaving nothing in his name to satisfy the same or any

part thereof; that the said Alfred Jones has always, since the making of said deed of trust, lived upon and enjoyed the use of said land; that by virtue of the purchase of said lands by plaintiffs, they became the owners of and entitled to said land, or to the equity of redemption in and to the same, so far as there were bona fide debts provided for in said deed of trust.

It is therefore prayed, that if there are any valid subsisting liens, upon said lands, by virtue of said deed of trust, plaintiffs may be permitted to redeem said land by the payment of such debts, and that said deed, as to other fictitious creditors named therein, may be declared to be fraudulent and void, and that the same be canceled so far as the rights of plaintiffs are concerned, etc.

The plaintiffs, before the filing of answers by defendants, dismissed their suit as to defendants Talbott, Rucker and Russell.

The suit was removed to Ray Circuit Court for hearing, by change of venue. At the March term of the Ray Circuit Court, for the year 1872, the defendants, Alfred Jones, Thomas J. Jones and McGirk, each filed a separate answer to the petition. The defendant, Alfred Jones, in his answer admitted his indebtedness to plaintiffs and others, as set forth in the petition, and also admitted the execution of the deed of trust to McGirk, as charged, but averred that said deed of trust was executed for the honest purpose of securing the just debts of said defendant, as therein named. The said answer then, after denying material allegations of the petition sets up, as a defense to plaintiffs' action, that the plaintiffs associated themselves together at the time of the sale of the lands by the sheriff, as charged by plaintiffs, with the intention that one of their number should bid for said land for all of them, thereby to depress competition at said sale and thus to procure said land at a mere nominal sum, and that they did thus bid for said land, and that the bid so made by them was the only bid made for said land at said sale; that no opposing bid having been made the land was sold and conveyed to said plaintiffs, who thereby received no title to said land, etc.

Thomas J. Jones, by his answer, admits the execution and delivery of the deed of trust to McGirk, by his father, Alfred Jones; but he avers that it was executed for the honest purpose of securing the just debts of said Alfred therein named. He denies all fraud and all other material allegations of the petition, and relies on the same alleged combination on the part of plaintiffs, set up by Alfred Jones in his answer; after which he sets up as an additional defense, that he, on the ninth day of September, 1869, having become the owner of all the debts named in, or secured by, said deed of trust given to McGirk, then amounting to over \$14,000.00, purchased the land named in the petition and in said deed of trust, from said trustee, under the power given in said deed of trust, for the said sum of \$14,000.00, the same being honest debts of said Alfred Jones, and said sale being honestly and fairly made by said trustee, and the price paid being more than could be obtained for said land from any other person; that said trustee, by deed of that date, conveyed said lands to said defendant, who is now the legal owner thereof, etc.

Defendant, McGirk, denied all fraud on his part, or knowledge of fraud in others:

Replications were filed, putting in issue the affirmative allegations of the answer.

At the March term of the Ray Circuit Court for the year 1873, a trial was had and a decree rendered, in favor of the plaintiffs, in conformity to the prayer of the petition.

The defendants, in due time, filed motions for a rehearing and in arrest of the judgment, which, being severally heard and overruled by the court, the defendants excepted and have brought the case to this court by appeal.

There are several questions raised in this court for consideration, growing out of the action of the Circuit Court upon the trial of the case.

No question is made, in this court, as to the regularity of the judgments, executions, levy and sale of the land in controversy, by the sheriff, to plaintiffs, and of the deed made to plaintiffs by the sheriff, for the same; the only objection made

to the validity of said sheriff's sale being that the plaintiffs had associated themselves together for the purpose of making a joint purchase of the land, which it is contended had the effect to prevent competition at the sale, and that it thereby rendered said sale void.

The evidence to sustain this objection was to the effect that there were some four or five judgments and executions in the hands of the sheriff, which were in favor of several plaintiffs in this suit in different amounts, amounting in the aggregate, to between fifteen hundred and two thousand dollars. The judgments upon which these executions had been issued had all been rendered at the same term of the Lafayette Circuit Court, and therefore the lien thereof upon the land in controversy were of equal dignity. The executions were all levied on the land in controversy, together with other property, all of which had been conveyed away or incumbered to its full value, by Alfred Jones, the defendant in said executions, and it appears to have been believed by plaintiffs, that the conveyance of said land and the incumbrances placed thereon had been so placed on said land to hinder and delay creditors and that the same might be set aside by a suit at law, but that, neither one of the plaintiffs was willing to purchase the land at the sheriff's sale and litigate the questions as to the legality of the incumbrances thereon for the amount of his individual debt; wherefore, the plaintiffs all agreed that one of their number should bid for the land, for the joint benefit of all, and that they would continue to bid on said property until it was run up to the aggregate amount of all of the executions in the sheriff's hands, if the same could not be purchased for a less sum, and that the land, when so purchased, should be the joint property of all of the plaintiffs. It is further shown that, in pursuance of this agreement, the land was purchased at the sheriff's sale by the plaintiffs. It is insisted by the defendants that this purchase was illegal and void, and could confer no title on the plaintiffs.

It does not appear from the evidence that it was any part of the intention of the plaintiffs to depress or lessen the price

at which the land should be sold, but on the contrary, the only witness who testified on this subject states that the plaintiffs were anxious that some person should bid an amount for the land sufficient to satisfy the executions; that if this had been done, plaintiffs would have at once desisted from bidding; that they did not want to purchase the land, but to collect their debts.

In the case of Wooten vs. Hinkle, (20 Mo., 290) it is stated "that a combination of interests to purchase property at sheriff's sale, will be valid or not according to the views with which it is made. If it is effected with a design to depress the price, it will be void; but there may be circumstances which will render a combination at a sale lawful, when it is entered into with no improper view." This, it is said by Judge Scott, is not inconsistent with the decision in that case.

In the case of Stewart vs. Severance (43 Mo., 334), Judge Wagner, when discussing this same subject, remarks, that the defendants in that case, "for the purpose of indemnity, and saving themselves harmless from liability, had the unquestioned right to agree among themselves that they would bid an amount sufficient for that purpose; and if they were guilty of no improper conduct, and resorted to no trick or artifice calculated to depress the price or deter bidders, the sale should stand, notwithstanding it may have inured greatly to their benefit. To make the transaction fraudulent, it should be shown that there was a conspiracy to depress the bidding." The quotation just set forth would seem to dispose of the question now being considered in this case; there was nothing unlawful in the arrangement and purchase made by plaintiffs, there was no attempt or purpose to depress or discourage bidding, and the sale was good and valid.

The defendant saved several exceptions to the rulings of the court in the admission of evidence objected to by the defendants, and which rulings of the court, it is insisted, were erroneous; but it will be more convenient to consider said objections in connection with the discussion of the merits of the case as developed by the evidence.

It appears from the evidence in the case, that in the year 1862, Alfred Jones was indebted to the plaintiff in about the aggregate amount named in plaintiff's petition, and owing also some other debts which are undisputed; that in October. 1863, plaintiffs commenced suits on their several demands. and recovered judgments thereon in May, 1864, as charged in plaintiff's petition; that on the 6th day of July, 1863, Alfred Jones and wife, by deed which was acknowledged on the 23d day of July, 1863, conveyed to one William M. Duggins (who was their son-in-law) several tracts of land, amounting in all to nearly two hundred acres, which was situate near Lexington in Lafayette County, Missouri, and in and by the same deed they conveyed to Duggins a number of horses, mules, colts, cattle, hogs, wagons, harrows, plows, plow-gear, double-trees, single-trees, grain cradles, mowing scythes, wheat fan, etc., together with several negro slaves named in said deed. The said personal property included all of the stock and farming utensils then owned by said Alfred Jones. This land and personal property purported in said deed to have been sold to said Duggins for the consideration of nine thousand dollars, of which, it is recited in the deed, that three thousand dollars was paid in hand, and the remainder secured to be paid by three promissory notes executed by said Duggins, and payable to Alfred Jones or order, for the sum of two thousand dollars each, one of which was payable one year, one payable two years, and the other payable three years from date. A lien for the deferred payments was specifically reserved in the deed.

It further appears, that on the 23d day of July, 1863, the same day on which said deed executed to Duggins was acknowledged, said Alfred Jones and wife executed a deed commonly called a deed of trust, by which they conveyed to one McGirk the land named in the petition, together with the following described personal property, to-wit: "All my household and kitchen furniture now in and about the dwelling house and kitchen on said lands, now occupied by me, consisting of beds, bedding, tables, chairs, sofas, bureaus, car-

pets, stands, lamps, curtains, shades, knives and forks, china and earthen ware, etc., etc., except such of said articles and property as is by law exempt from levy and sale on execution when owned by the head of a family." This deed also conveyed some negroes, all of which was conveyed to said McGirk in trust to secure the payment of certain debts named therein, as stated in the plaintiff's petition.

The plaintiffs offered and read in evidence on the trial, a petition in bankruptcy filed in the United States Bankrupt Court by said Alfred Jones in December, 1868, together with the schedules filed therewith and proceedings thereon, by which it appeared that said Alfred Jones was insolvent, having no property at the time of filing said petition. This evidence was objected to by the defendants, because it was irrelevant, not tending to prove any issue in the cause. It was also objected to said evidence that it could only be construed to be the admissions of Alfred Jones made some six or eight years after the right of Thomas J. Jones had accrued, and hence was wholly incompetent as evidence as against said defendant, Thomas J. Jones. The court overruled the said objections, and admitted said evidence, to which exceptions were saved.

James Iles, a witness for the plaintiff, testified that he was acquainted with Alfred Jones, and had a conversation with him in the latter part of the year 1863, or the forepart of the year 1864, at the house of said Jones; that in said conversation Jones stated that he was sued by a lot of men, Crittenden, the Bank and others; that he also said he had a bad set of children; that he had sent money to California to bring his son, Thomas J. Jones, home; that he wished Thomas had died before he got home; that he did not know whom they "took after," as they did not take after him or their mother; that he had them all to support; that he wished he had his property in his pocket, he thought he was smart enough to get it there, and then they might "whistle."

The defendant objected to the foregoing evidence on the grounds that the admissions or statements of Alfred Jones,

made long after the deed of trust to McGirk was executed, were incompetent evidence as against McGirk and said Thomas Jones, to disparage their title to, or right in, the land named in said deed. The court overruled said objection and admitted said statements as evidence in the cause, to which ruling exceptions were saved.

The plaintiffs also proved similar statements to have been made by said Alfred Jones, in reference to his having sent money to his son Thomas when in California, to bring him home, some of which statements were made before Thomas returned from California, in 1854 or 1855, and some were made after his return from California, and after the note to Thomas J. Jones purports to have been executed.

The same objections were made to this evidence that were made to the evidence of Iles, and were overruled by the court and exceptions taken. The witnesses last referred to, each testified that they had been well acquainted with Alfred Jones and Thomas J. Jones for some twenty or thirty years; that before Thomas Jones went to California he resided with his father; had just become a grown man; had no property that witness knew of; and that after he returned from California he had no visible property, except a horse; and that he had made a crop of hemp one season; that he seemed to have no regular business, but had done some work for the Shelbys. Part of these witnesses had been with Thomas J. Jones a portion of the time during which he was in California, and thought that he had no property and had made no money while they were with him; at least that he had no means they knew of.

William H. Day a witness, who was a cousin of Thomas J. Jones, stated that he had been with Jones in California for nearly one year after he went there in 1849; that he made no money to witness' knowledge while he remained with him in California; that witness was intimate with said Jones after his return from California; that witness did not know of any property or money that belonged to said Thomas, before his leaving for the South in 1857; that he came home from Cali-

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fornia sometime in the year 1854, and left for the South about the year 1857. This witness, as well as several others, stated on cross-examination, that they were not friendly with Alfred Jones. The said witness also stated that Thomas J. Jones, in conversation with witness after his return from California, stated that he might as well have come home at the same time witness returned, and used other language which induced witness to believe that he had made no money while in California.

The witness, Day, also testified that Alfred Jones, about the month of May, 1864, asked him if he would be the trustee of his wife in the purchase of the debts named in the deed of trust to McGirk, except the debt to Thomas J. Jones; that witness consented to act as trustee for his aunt, the wife of Alfred; that the next day Mrs. Jones furnished him money to purchase said debts; that he purchased said debts and had them all assigned to himself, as trustee, for the use and benefit of May Jones, the wife of Alfred Jones. The evidence of this witness, as well as that of other witnesses, strongly tended to prove that the money with which these debts were purchased was furnished by Alfred Jones, and was really his money. The evidence further shows, that in 1867 or 1868 Mrs. Jones died, and that Thomas J. Jones afterwards purchased, or professed to have purchased, the interest of his brother and sister in these debts, which had been assigned to Day, in trust for Mrs. Jones, and that at the time of the commencement of this suit, Thomas J. Jones claimed to own all of the debts named or provided for in said deed of trust.

The defendants introduced a number of witnesses in support of their defense. Joseph Shelby testified on the part of the defendants, that he was well acquainted with the defendants, Alfred and Thomas J. Jones; that in the years 1856 and 1857 Thomas J. Jones worked part of the time for Thomas Shelby, and part of the time for witness (this was after the return of Jones from California); that he worked for Thomas Shelby for some time at \$40 per month, and then worked for witness at the rate of \$600 per year; that Thomas J. Jones

helped witness to manage his farm and hands, and assisted in buying and taking care of stock; that Thomas J. Jones at that time had money; that he advanced money to witness to help pay for cattle; that when said Jones quit the service of witness, in the year 1857, witness settled with him, and paid him sixteen hundred dollars, and that witness thought Jones had more money than what he paid him; that a short time after Jones quitted the service of witness in 1857, he left for the South where he had generally remained ever since.

Thomas J. Jones testified on his own behalf, that he had worked for himself, by the permission of his father, from the time that he was seventeen years old; that he had cultivated and raised hemp on his father's lands, his father's negroes sometimes assisting him to cultivate it; that in 1849, when he went to California, he was about twenty-one years old, and had two thousand dollars; that his father gave him a wagon and outfit to go to California; that he took his two thousand dollars in money with him to California; that he did not spend it while there; that he remained in California for about five years, and that some part of the time he made nothing, and during other portions of the time he made money; that when he returned from California he brought home with him, including the most of the two thousand dollars taken to California with him, the sum of nine thousand, five hundred dollars; that a portion of this sum was brought over to New Orleans in gold and gold dust, where he exchanged it for paper money and brought it home; that after he got home he deposited part of his money with a merchant in Lexington, who is now dead, and kept a portion of it himself; that after he had so returned home he worked for some time on his father's farm, and afterwards worked for the Shelbys; that he loaned Joseph Shelby about a thousand dollars while with him, and when he settled with Shelby in 1857, he paid him \$1600; that he had also loaned a man in Saline county, a brother of his mother, \$2,000; that in the fall of 1857, after he settled with Shelby, his father, having had his house burned down, and being engaged in erecting

another house of brick, worth from five to six thousand dolars, desired him to loan his father the money with which to erect the house, and that he loaned his father \$5.350, which included the \$1,600 just a short time before paid him by Shelby; that at the time his father executed to him his promissory note for said amount, which is the same note named in the deed of trust to McGirk. He also stated, that shortly after loaning his father this money he went South, where he remained, in the States of Louisiana and Mississippi, until the year 1861; that he was engaged in "overseeing," in the South, made good wages, sometimes on a yearly salary, and sometimes got part of the crops produced; that in the year 1861, when the war broke out, he had accumulated, including some money taken with him to the South, seven thousand dollars; that he returned home in 1861, and left with his mother this seven thousand dollars, as well as the note on his father for \$5.350, and at the same time told his father that he thought he ought to give him a mortgage to secure said note; that he stayed at home but a short time, when he returned South and joined the Confederate army, and did not return to Missouri again until the year 1865, when his mother returned him the note on his father and a note on his brother-in-law, Duggins, for two thousand dollars, which she had purchased from Alfred Jones with part of witness' money, and the balance of the money left with her in 1861. He also testified, that after the death of his mother, he had purchased the debts assigned to Day for her use, named in the deed of trust, from his brother and sister, for \$1,600.

Alfred Jones corroborates the evidence of Thomas J. Jones, in reference to his having large sums of money after his return, and as to his having about two thousand dollars when he went to California, and as to the loan of the sum of \$5,350 to him in the Fall of 1857, to pay for the erection of his house. He also states that he was not at that time embarrassed with debts, but that he did not have the money to spare from his business to pay for the erection of his house, and hence borrowed the same from his son, Thomas J. He also testifies that the deed of

trust was executed to McGirk to secure the debts therein named, in good faith, and that all of said debts were just debts, and that they were-all but the debt in favor of Thomas J. Jones-afterwards purchased by his wife with her own money, in the name of William H. Day, her trustee; that his wife had money of her own; that her father had given her a negro woman, and that the said negro had afterwards become the mother of several children, all of whom had afterwards been sold by his wife for three thousand dollars, which was with his consent kept. by her in her own right, and used as she pleased, and that it was with part of this money that the notes were purchased by and assigned to Day as trustee for his wife. He denies that he ever made the statements attributed to him by other witnesses, in reference to his having sent money to California to pay the expenses home of his son, Thomas J. Jones, and other statements connected therewith.

Mrs. Duggins, the daughter of Alfred Jones, and William. Duggins, her husband, were examined as witnesses for defendant, each of whom testified that after the house of Alfred. Jones was burned, in 1855 or 1856, he and his family lived onhis farm—the farm now in controversy—in a negro cabin on said farm, until the new brick house was erected in 1857 or 1858; that witnesses resided part of the time with the family of Alfred Jones in said negro cabin; that they were present in said cabin in the Fall of 1857, when Alfred Jones borrowed over five thousand dollars of his son, Thomas J. Jones; that the money was said to be borrowed to pay for the erection of the new house; that they were present when the money was counted; did not count the money themselves, but heard and saw Alfred and Thomas Jones counting the money; that it seemed to be a large quantity of paper money, and that according to the count made in their presence, the money amounted to over five thousand dollars, for which Alfred Jones gave Thomas J. Jones his note at the time. Witnesses did not read the note, but saw Alfred Jones write it and heard it read, and saw it delivered to Thomas J. Jones. These witnesses corroborated the evidence of Alfred Jones

in reference to the \$3,000 received by Mrs. Jones for the negroes and also corroborated the other evidence in the case proving that Mrs. Jones carried a large amount of money in a belt worn by her around her person.

Henry Jones, a son of Alfred Jones, also testified as to the money carried by his mother, and as to the purchase by her of the notes named in the deed of trust.

The plaintiffs introduced a witness in rebuttal, whose evidence tended to prove that in 1864 or 1865, Mrs. Jones seemed to be destitute of means of any kind whatever, and was unable to pay a small bill for medical attention to her own person.

Several witnesses were introduced by plaintiff, who testified that the character of Alfred Jones for truth, was not good. After which, defendants introduced about an equal number of witnesses who testified that the character of Alfred Jones, for truth, was good.

At the close of the evidence, the attorneys for the defendants moved the court to exclude from the evidence in the cause all and each of the admissions or statements of Alfred Jones given in evidence upon the trial, and which were objected to at the time, as to the defendant, Thomas J. Jones, in the consideration of the cause. The court overruled said objection and the defendants excepted.

The first question to be considered by this court in the further investigation of this case is, whether the evidence adduced on the part of the plaintiffs, independent of the admissions and statements of Alfred Jones, was or is sufficient to show such a conspiracy or combination, between Alfred Jones and Thomas J. Jones, to hinder and defraud the creditors of Alfred Jones, as to make admissions and statements of Alfred Jones, made either before or subsequent to the time of the execution of the note and deed of trust to Thomas J. Jones proper evidence against him.

The general rule certainly is, that the declarations of a grantor, made after the execution of his deed cannot be used to defeat it. There are, however, several exceptions to this general rule. One exception is, where several persons have em-

barked in a common object or undertaking. In such case the common object and purpose having been first clearly made out, the declarations of one while engaged in the prosecution of the common object, may be received against another. A very common case where an exception is applied to the general rule, is where a debtor remains in the possession of personal property after a sale thereof. What he may say while thus in possession, is receivable against the vendee as a part of the res gestæ to make out a fraud against the creditors. (Waterbury vs. Sturtevant, 18 Wend., 353; Cuyler vs. McCartney, 33 Barb. S. C. 165; Peck vs. Crouse, 46 Barb., 151; Weinrich vs. Porter, 47 Mo., 293; Stewart vs. Thomas, 35 Mo., 202.)

The admissions given in evidence in this case made by Alfred Jones were not made in reference to, or in connection with the possession of personal property which had been sold so as to be explanatory of said possession and thus constitute a part of the res gestæ; but if said admissions could be proper evidence as against Thomas J. Jones, it must be on the ground that Alfred and Thomas Jones had entered into a common design to hinder and defraud the creditors of Alfred. This last ground is the one upon which it is insisted by the plaintiffs that the evidence is admissible. Nor does the evidence offered by the plaintiffs, independent of said statements justify the court in finding that any such common purpose or combination existed between the parties, and that the admissions and statements were made while engaged in the prosecution of said common object. If we take the theory of the plaintiffs, that the note given to Thomas J. Jones was a sham, and was executed without any consideration at the time of the execution of the deed of trust in July, 1863, and antedated so as to appear to have been executed in the Fall of 1857, then all of the evidence shows that at the time of the execution of the mortgage, Thomas J. Jones was not in the State of Missouri, and never returned to the State of Missouri until the year 1865. By this it will appear that no combination could have been entered into between Alfred and Thomas J. Jones before the year

1865, while all of the statements given in evidence were made before that time and could not have been made while Alfred Jones was prosecuting a common design between him and his son which the evidence shows could not have been entered into before the year 1865. If we take the evidence of the defendants, and find that the note to Thomas J. Jones was executed in October, 1857, then there is no evidence to show that Alfred Jones was, at that time, in the least embarrassed with debts, or that he was so embarrassed for five years thereafter; so that no motive or excuse existed in 1857 for forming any design to defraud the creditors of Alfred Jones.

It is, however, insisted, that Thomas J. Jones, after he returned to Missouri in the year 1865, assented to a design before made by Alfred Jones to delay and defraud his creditors. and joined with him in said design, and has been assisting him since the year of 1865, in carrying out and accomplishing such design, and that this entering into said design in 1865 will relate back to the time when such design was first formed by Alfred Jones, and make his statements and admissions made from the inception of said design, evidence against said Thomas J. Jones. I cannot exactly see how such a position is to be maintained. If Thomas Jones agreed to a fraud perpetrated for his benefit in 1863, in the year 1865, I cannot see how it would make the statements of Alfred Jones made long before said time, and of which he had no knowledge, evidence against him. If he assented to, and joined the fraud after its perpetration had been commenced, he would be bound by the whole consequences resulting from the fraud; but that would hardly make statements made by the party at a time when he even had no knowledge of the transaction evidence against him. But whether this would be so or not could make no difference unless the evidence, independent of said admissions, is sufficient to prove this common purpose or design.

The evidence of the plaintiff to prove this design to defraud on the part of Thomas J. Jones, aside from the statements of Alfred Jones, consists of the testimony of a number

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of witnesses—some five or six—who testify that they have been acquainted with Thomas J. Jones from before the time that he was grown up to manhood, and that they never knew him to have any property either before he went to California or after his return therefrom, and some of the witnesses state that they knew him part of the time he was in California, and did not think that he made any money during that time; and some other evidence was introduced which tends to show that it was not probable that he had as much money as five thousand dollars. On the other hand, Alfred Jones, Thomas J. Jones, Mrs. Duggins, and William H. Duggins, all swear positively to the loan of the money, and swear that they saw him have large rolls of money after his return from California, and Henry Jones swears that he had money.

Joseph Shelby swears that Thomas J. Jones received \$1,600 from him shortly before the money purports to have been loaned to Alfred Jones. We would not be authorized to hold that all of these witnesses are guilty of perjury simply from the fact that the neighbors of Thomas J. Jones did not know that he had money, and because his conduct in reference to his money was rather inconsistent with the usual conduct of young men similarly situated. I do not think that, to take all of the evidence together, independent of the statements and admissions of Alfred Jones, it is sufficient to authorize the court to find, in reference to the note executed to Thomas J. Jones, that there was a combination between the father and the son to defraud the creditors of Alfred Jones such as would make the statements of the one in reference thereto, evidence against the other.

The admissions of the petition in bankruptcy filed by Alfred Jones, in evidence, are also objected to as being erroneous so far as Thomas J. Jones was concerned. This petition was filed some five or six years after the execution of the deed of trust to McGirk, and long after plaintiffs had purchased the land in controversy at execution sale and after the commencement of this suit so that we cannot see how anything in the petition and proceedings in bankruptcy filed by Alfred Jones

at that time, while Thomas J. Jones was absent from the country, could be admissible against him, and so far as such proceedings are copied into the bill of exceptions, we cannot see how the evidence could be material in the cause, unless it should be for the single purpose of showing that Alfred Jones was at that time insolvent, or professed so to be.

If the decree made in this case had only declared that the debts named in the deed of trust which had been transferred to witness Dav in trust for Mrs. Jones, had been satisfied by the money of Alfred Jones and transferred to Mrs. Jones, in order to keep up an apparent incumbrance on the land in controversy after said debts had been satisfied and paid, and then proceeded to cancel said debts and declare them satisfied so far as plaintiffs were concerned, we would not feel authorized to reverse the judgment in the case. The evidence in the case was sufficient to show that Alfred Jones was attempting to get his property out of his hands for the purpose of hindering and delaying plaintiffs in the collection of their debts against him. The fact that he conveyed all of his real and personal property including all of the stock and farming utensils belonging to him, even his plows and double trees and single trees, and all of his household and kitchen furniture "except such as was exempt from sale under an execution" by the laws of this State, when taken in connection with his statements to witness Iles that he was smart enough to get his money in his pocket and keep it, and the other facts in evidence in this case were sufficient to authorize the court in finding the fraudulent intent on the part of Alfred Jones. And the evidence strongly tended to prove that the debts assigned to Day, as trustee for Mrs. Jones, were paid with the money of Alfred Jones, and Thomas J. Jones only claimed to have purchased the interest of his brother and sister in these debts, and that he holds the balance of the interest in said debts as the heir and representative of his mother, and that he, as to said part, had paid no value therefor, and the evidence showing that the negroes sold, from which his mother professed to have gotten the money to purchase these debts, were

really the property under the laws of this State, of Alfred Jones, a fact which was or ought to have been known to said Thomas J. Jones. The court might therefore very properly have canceled these debts as to Thomas J. Jones, and have satisfied the mortgage to that amount, regardless of the admissions and statements of Alfred Jones given in evidence.

We do not think that the sale by the trustee of the property in controversy to Thomas J. Jones, during pendency of this suit, could in any way affect the rights of the parties. The exclusion of the trustee's deed to Thomas J. Jones by the court when it was offered in evidence, could not therefore have injured the said defendant.

Judge Hough did not sit in this case. The other judges concurring the judgment will be reversed and the case remanded.

HERMAN ISABEL, Respondent, vs. THE HANNIBAL & St. JOSEPH RAILROAD COMPANY, Appellant.

- 1. Railroads—When responsible for killing of person notwithstanding his contributory negligence.—Although one may be improperly or unlawfully on the track of a railroad, that fact will not discharge the company or its employees, from the observance of due care, and where he is run over by the train and killed, the company will be responsible if its officers could have avoided the accident by the exercise of ordinary caution and watchfulness.
- 2. Railroads—Negligence—Degree necessary to charge company in case of infant.—Proof of a less degree of negligence will be necessary in order to charge a railroad company for injuries in case of an infant than in that of an adult.
- Railroad private property—Right to pass upon.—A railroad track is private
 property and, except at highway crossings, persons have no right to pass
 upon it.
- 4. Travis—Diligence in running—In town—Over crossings.—The same diligence is not imposed on the officers of a train in running it through the country at large, as in the streets of a town, or the crossings of a public highway.
- 6. Railroads—Running over child—Care necessary to be exercised by company—Proximate cause.—In suit for damages against a railroad company for running over a child which had strayed upon the track, it appeared that the child was seen by the officers in time to avoid the collision, but mistaken

for something else; and that by the exercise of a proper degree of care and caution, they might, after first observing the object have discovered that it was a child in time to stop the train before the accident occurred. *Held*, that in such case, although some negligence might have been attributable to those having charge of the infant, it was not the proximate cause of the casualty, and the company would be liable.

6. Railroads—Statutory requirement as to fencing—Failure to fence may be shown in case of killing of child, when.—Where the road bed of a railroad is laid near to a dwelling-house, and the child of the owner gets upon the track and is killed by the train, plaintiff may show, as an element of negligence on the part of the company, a failure to fence its track as required by the statute, even though the primary object of the requirement was merely protection of cattle and other stock.

Appeal from Caldwell Circuit Court.

Carr & Leach, for Appellant.

I. The law requires railroad companies to enclose their roads with a fence where it passes along inclosed or cultivated fields, etc. The petition fails to show that Isabel was killed at a point embraced by any of the above requisitions.

II. For the first time the idea is advanced, that fences are erected to keep human beings from railroad tracks.

The objects of fencing railroads are simply the preservation of the lives of passengers, the property of the railroad companies, and to prevent stock from getting upon the track. And failure to fence is no proof of negligence, so far as it affects the case at bar.

III. The want of vigilance and care on the part of the grandmother was the direct, sole and absolute cause of the wrong complained of. If she had not been negligent in the discharge of her duty, the accident would not have happened.

It has been held negligence as a matter of law to allow a child of about two years to go into the streets unattended. (Hartfield vs. Roper, 21 Wend., 615; Callahan vs. Bean, 9 Allen, 401; Kreig vs. Wells, 1 E. D. Smith, 74; Mangum vs. Brooklyn R. R. Co., 36 Barb., 230; Glassey vs. Hestonville, etc., R. Co., 57 Penn. St., 172; Singleton vs. Eastern Counties R. Co., 7 C. B. [N. S.], 287; Boland et ux. vs. Missouri R. R. Co., 36 Mo., 484; Philadelphia & Reading R. R.

Co. vs. Spearen, 47 Penn. St., 300; Holly vs. Boston Gaslight Co., 8 Gray, 123; Wright vs. Malden, etc., R. R., 4 Allen, 283.)

IV. It is unlawful for any one not connected with the road to walk along the track of any railroad. (Wagn. Stat., 311, § 43, last clause.)

An engineer is not bound to foresee the presence of any one on the track, even when it is open to an adjoining highway. (Shearm. & Redf. Neg., § 493; Philadelphia & Reading R. Co. vs. Hummell, 44 Penn. St., 375.)

M. A. Low, for Respondent.

I. It was not error to permit witnesses to testify that the railroad was not fenced at the place of the accident. If from the want of fence, accidents were more liable to occur at that point than would have been the case if the road had been fenced, and the company had notice of this fact, it was the duty of the defendant's employees to use more than ordinary care and diligence to prevent such accidents, and to run their trains with reference to such circumstances. (Schmidt vs. Milwaukee etc. R. R. Co., 23 Wis., 186; Singleton vs. Eastern, etc. R. R. Co., 97 Eng. Com. Law, 287.)

The disregard of the positive command of the statute was negligence (Karle vs. K. C., etc. R. R. Co., 55 Mo., 476), and the company were liable for all damages flowing naturally from such default. And regardless of the statute, it would seem that where a railroad company runs its road through a man's yard, where his children have the right to play, unrestrained, it ought to take all reasonable precautions to guard against injuring such children with its dangerous and destructive machinery. (See Railroad Co. vs. Stout, 17 Wall., 657; Britton vs. Great Western, etc. Co., L. R., 7 Exch., 130; S. C., 1 Eng. Rep., 381; Kay vs. Penn. Railw. Co., 65 Penn. St., 269; Lynch vs. Nurdin, 1 Q. B., 29; Bellefontaine R. R. Co. vs. Snyder, 18 Ohio St., 399; Railw. Co. vs. Bohn, 12 Am. Law Reg., 759, note.)

II. If defendant's employees, in charge of the train, by the exercise of ordinary skill and caution, could have observed the child upon the track, and recognized him as an infant, in time to stop the train before it ran over him, the company are liable, even though the guardian of the child may have been negligent in permitting it to wander upon the railroad track. (Cincinnati, etc. Rail. Co. vs. Smith, 22 Ohio St., 227; Richmond vs. Sacramento Rail. Co., 18 Cal., 351; Railroad Co. vs. Gladmon, 15 Wall., 401; O'Flaherty vs. Railroad Co., 45 Mo., 70; Boland & Wife vs. Missouri R. R. Co., 36 Mo., 484; Brown vs. Hann. & St. Jo. R. R. Co., 50 Mo., 461; Morrisey vs. The Wiggins Ferry Co., 43 Mo., 380; B. & O. R. R. Co. vs. Dougherty, 36 Md., 366; Bemis vs. Conn. etc. Rail. Co., 42 Vt., 375; Walsh vs. Miss. Trans. Co., 52 Mo., 434, Lynch vs. Nurdin, 1 Ad. & El. [N. S.], 28; Karle vs. K. C., etc., R. R. Co., supra; Berge vs. Gardiner, 19 Conn., 507; Bronson vs. Southbury, 37 Conn., 199; City vs. Kirby, 8 Minn., 169; Robinson vs. Cone, 22, Vt., 213; Whirley vs. Whiteman, 1 Head., 620; O'Flaherty vs. Union R. R. Co., 45 Mo., 70; Railroad Co. vs. Stout, 17 Wall., 657.)

The employees, in charge of a train, must use ordinary care and prudence to see and save even trespassing animals. (Rockford, etc. Rail. Co. vs. Lewis, 58 Ill., 49; Cincinnati etc. Rail. Co. vs. Smith., 22 Ohio St., 227; Bemis vs. Conn. etc. Rail. Co., 42 Vt., 375; Toledo, etc. Rail. Co. vs. Ingraham, 58 Ill., 120.)

The engineer, upon his own version of the matter, was guilty of gross negligence, in not slacking the speed of the train when he first saw the obstruction on the track at a point where children were in the habit of crossing. It is no excuse that he thought it was an animal. He was in doubt as to what it was, and ran recklessly along until it was too late to prevent running over it. (East Tennessee Railw. Co. vs. St. John, 5 Sneed, 524; Wright vs. N. Y. Cent. Railw. Co., 25 N. Y., 569; Regina vs. Longbottom, 3 Cox [C. C.], 439; Whart. Neg., § 802; Lafayette Railw. Co. vs. Adams, 26 Ind., 76; Chicago, etc. Railw. Co. vs. Cauffman, 38 Ill., 424; Rail-

road Co. vs. Spencer, 47 Penn. St., 300; Railroad Co. vs. Bami., 55 Ill., 226; Garner vs. Hann. & St. Jo. R. R. Co., 34 Mo., 235; Kerwhaker vs. C. C. & C. R. R. Co., 3 Ohio St., 172.)

WAGNER, Judge, delivered the opinion of the court.

This was an action by plaintiff to recover damages for the negligent killing of his infant son, by defendant, while running and managing a locomotive and train of cars on its railroad.

The evidence tended to show that plaintiff's wife being dead, he had placed the child in the care of its grandparents who resided about seventy-five yards distant from the road. The house was built before the railroad was constructed; but there was no fence intervening between it and the railroad. The grandmother, who had the care and custody of the child, which was only about twenty-one months old, testified that it was not permitted to go upon the railroad track, but sometimes played about the yard with the other children; that she prevented it from going out of the house as much as she could; that she kept it pretty close and never allowed it to go away; that it never had gone away before, and that on the morning on which it was killed, whilst she was temporarily absent, it slipped out of the house and went upon the track. It there sat down between the rails. The morning was bright and clear, and for eighty rods in the direction in which the cars were running, the track was straight and almost level.

The evidence of the plaintiff tended to show that the child might have been seen at least eight hundred feet from the place where it was run over and killed; and the testimony of the defendant's witnesses was, that it was seen in time to have stopped the train, but that it was mistaken for another object; and it was not discovered that it was a human being till the cars had approached too near to avoid the catastrophe.

Under the instructions of the court the jury found a verdict for the plaintiff.

The fifth and sixth instructions given for the plaintiff are the material ones and they alone will be noticed.

The fifth instruction declared, that though Isabel had no right to be on the track of defendant's railroad, yet, the fact that he was upon their property, did not discharge them from the observance of due and proper care towards him; nor, did it give defendants or their employees any right to run over him, if that could have been avoided by the exercise of ordinary care and watchfulness.

The sixth instruction told the jury that if they believed from the evidence that George A. Isabel, at the time he was killed, was a minor, under two years of age, that his mother was dead, that the plaintiff was his father, and that those in charge of defendant's train, by the exercise of ordinary skill and caution might have observed the child on the railroad track, and recognized him as an infant, in time to stop the train before it reached and ran upon him, they would find for the plaintiff, though they might believe from the evidence that plaintiff, or those having the child in charge, were guilty of negligence in not preventing the child from going upon the railroad track.

For the defendant the court gave four instructions, and those numbered six, eight and nine are the only important ones.

The sixth asserted that it was the duty of the parent or person having the custody of a child, at all times to shield the child from danger, and that duty was the greater where the danger and risk were imminent; and the degree of protection should be in proportion to the helplessness and indiscretion of the child, and the imminence of the danger.

The eighth declared that it devolved upon the plaintiff to show by the evidence, that the death of the child was occasioned by the negligence of the employees of defendant in charge of the train; and the fact that the child was killed at a point on defendant's railroad, shown in evidence, raised no legal presumption of negligence on the part of defendant or its employees.

The ninth told the jury that the use of a railroad track, except where a highway crosses it, is exclusively the right of the railroad company which owns it, and the company and its employees are under no obligation to anticipate that children will be sitting or playing on the track, but they have a right to presume that no one will be on the track, except where a highway crosses it; and if the jury should find from the evidence, that the employees of the defendant on the train, so soon as they saw the child, did all in their power to stop the train, and that the child was killed on the road at a point where it was not crossed by a highway, and that the employees, before and at the time they first saw the child, were in the exercise of ordinary care and diligence, then the verdict should be for the defendant.

The instructions refused by the court which the defendant asked for, were objectionable; but it will be sufficient to notice the third. That was, that if the jury believed from the evidence that the child was killed by reason of the negligence of the person who was in charge of it, and had it in custody, and that the carelessness of such person materially contributed to the death of the child, then the finding should be for the defendant.

There can be no objection urged against the plaintiff's fifth instruction. No doctrine is better established in this State than the principle it enunciates. Our decisions have been uniform, that although a person may be improperly or unlawfully on the track of a railroad, still that fact will not discharge the company or its employees from the observance of due care, and they have no right to run over and kill him, if they could have avoided the accident by the exercise of ordinary caution or watchfulness.

The sixth instruction is liable to some criticism, and is not as definite as it should be. It declares that if those in charge of defendant's train, by the exercise of ordinary skill and caution might have observed the child upon the railroad track and recognized him as an infant, in time to stop the

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train before it reached and ran over him, then the verdict should be for the plaintiff.

As an abstract proposition of law, this declaration in all cases might not be strictly correct. It might seem to cast upon the company a greater degree of diligence than is in all instances required; but when examined in the light of the evidence we think the objection disappears. The track is private property, and, except in the case of crossing highways, persons have no right to be on it. The company is entitled to a clear track, and it is not to be presumed that persons will be on it when they have no right to be there. The same diligence will not be necessary in running trains through the country that would be required in the streets of a town or the crossing of a public highway.

In order to make a defendant liable for an injury where the plaintiff has also been negligent, or in fault, it should appear that the proximate cause of the injury was the omission of the defendant, after becoming aware of the danger to which the plaintiff was exposed, to use a proper degree of care to avoid injuring him.

Diligence and negligence are relative terms and depend on varying circumstances. An act may be negligent at a particular place, which would not be so at another place, and under different circumstances.

In the present case the house was built before the road was constructed. The company had run its road in close proximity to the house, and had left the well where the family got their water on the other side of the track. Of this, the employees were well aware. They knew that the track ran close to the house, and that the family were accustomed to cross it to obtain water. This ought to have increased their vigilance.

All these facts, perhaps, would not amount to much in the case of an adult who should exercise his faculties and guard against the danger, but in the case of an infant, who has no discretion, the rule would be otherwise.

Moreover, it is clearly shown that the engineer and fireman discovered the infant, and had abundance of time to have

stopped the train and saved its life; but they debated as to what it really was, till it was too late. Might they not, by a close scrutiny, and a proper observance, which it was their duty to give when they discovered an object on the track, have discovered that it was a child? The testimony is conclusive, that the child was dressed in red, and that would have very easily distinguished it from a hog or a dog. The instruction, if it was intended to convey the idea that the employees, by using ordinary skill and caution after they observed the object on the track, could have distinguished that it was a child, was entirely proper. It was surely susceptible of this construction; and we are not justified in supposing that it was given with any other intent, or that it was differently interpreted by the jury. When the facts of the case are applied to it, this conclusion follows.

The case presented, then, is, that the persons running the train, saw something on the track in time to avoid collision or injury; and if, after they observed it, they could, by the exercise of that care and caution which the law imposes upon them have perceived that it was a child, in time to stop the train, and they were negligent, the company is liable.

Whilst some negligence might have been attributable to those who had charge of the child, if it was not the proximate cause—a recovery is not barred. People in the situation in life of those who had the custody of the child cannot always attend to it strictly; and if it escapes from them unawares, it must not be injured simply because it so escapes.

The ninth instruction given for the defendant, after laying down the law very fairly as to the right of the defendant to the exclusive and uninterrupted enjoyment of its track, goes even further than plaintiff's instruction first commented on in reference to defendant's liability. That instruction declares that defendant is not responsible if its employees before, and at the time they first saw the child, were in the exercise of ordinary care and diligence. Plaintiff's instruction only required care and caution in recognizing the child, after some object was observed on the track, whilst the defendant's instruction made it

obligatory that care and caution should have been exercised before the infant was seen. As this was defendant's own instruction, it cannot complain; it was a much better one for the plaintiff than the one he got.

The sixth instruction given for defendant needs no particular comment. It lays down the duties of parents, or those having infants in custody, in affording them protection and shielding them from danger.

It is complained that the seventh instruction was refused; but everything that was contained in it was given in a more full and satisfactory form in the ninth instruction.

The third instruction was rightly refused. It told the jury that defendant was not liable, if the person who had the child in charge, by carelessness, materially contributed to the child's death. This was incomplete; it did not make the negligence the proximate cause, nor did it say anything about the requirement of care and caution on the part of the defendant.

It is alleged as error, that plaintiff, on the trial, was permitted to introduce evidence to show that there was no fence along the road where the child was killed. It is argued that our statute, in relation to fencing, was intended to prevent cattle from straying on the track, but not to guard against children coming thereon.

This same question arose in Wisconsin in Schmidt vs. The Milwaukee and St. Paul Railway, (23 Wis., 186,) and the case turned and was decided upon the fact that the company had omitted to comply with the statute requiring it to fence.

The case was like this: the company had built its road, cutting the man's farm in two, only the house was further from the road in that case than in this. There, a path led from the house across the road to the other portions of the premises, on which path the child was injured, just as there was one here leading from the house to the well near which this child was killed.

In answer to the argument that the statute was not intended to apply to such a case, the court said that it must, in the first place, be remembered that the statute imposed upon all railIsabel v. Han. & St. Jo. R. R. Co.

road companies the positive duties of erecting and maintaining good and sufficient fences on both sides of their roads. with gates or bars therein, and farm crossings for the use of the proprietors of the adjoining lands. That was a clear, distinct and precise duty imposed by the legislature; and the failure to perform it in that case was the sole cause of the injury; for it was found that a fence would have prevented the accident. The facts in the case showed, that for more than a year the company had run its trains over the road, neglecting all the while to build a fence at the place; omitting to do not only what the law required, but common prudence demanded should be done, as well for the protection of persons traveling on the road, as for the security of the domestic animals of those residing along the track, and the safety of children exposed to its dangers who were incapable of taking care of themselves. When the company neglected to perform its duty, did it not necessarily assume responsibility for all damages which might result from that cause? Could the court make an exception to this general liability, when an infant was injured solely in consequence of the want of a fence? Would it not be an unwarrantable restriction of the statute, to hold that the duty imposed upon the company of maintaining a fence along its road had no reference to children?

The court said that if the verbiage of the statute was looked to, it might be concluded that the object of the law was solely for the protection of domestic animals, and yet it had been held that the law had a broader application, and was intended as a police regulation to secure the safety of passengers. It had been extended to cases which, if not clearly within the letter, were certainly within the spirit of the law; and the conclusion was arrived at, that it was in strict harmony with the principle and reasoning of the cases to say that the statute embraced the protection of children.

The same doctrine seems to prevail in England. In Singleton vs. The Eastern Counties R. R. Co., (7 C. B. N. S., 287,) it is assumed by the judges, that if the children had

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strayed upon the railroad track through the fence, at a place where a rail was off, which fence the company was bound to keep in repair, this would be such an act of negligence as would render the company liable.

Williams, J., in his opinion said: "There was nothing to show how the children got on the railway. All was mere conjecture and surmise." The plain inference from the case however, is that, if it had appeared that the child passed on the track through a defective fence, which the company was bound to keep up, then the action might have been maintained.

It is unnecessary to go the length of the Wisconsin case in this decision, or to hold that the statute imperatively requires that a fence should be constructed for the protection and safety of children. Unquestionably, when the law enjoins a duty, and commands a company to build a fence along the line of its road, where it runs through a man's farm, the omission to build is a breach of that duty which it owes to those for whose protection the fence was designed. Whilst it may be primarily intended to secure one object, it may incidentally have an effect on others. All must go together in determining the measure of the obligation. But, under certain exigencies, prudence would demand what was not positively enjoined by the strict letter of the law. Thus, exposing dangerous machinery where children are liable to play with it, and get hurt by it, might render the owner liable, though the children had no right to touch or interfere with it. So, running a railroad close to a man's house where his family and children resided, would require that certain safe guards should be used to shield them from danger.

There was no instruction asked for or given on the question of fencing. The failure to fence was merely introduced in evidence as an element conducing to show negligence; and, under all the circumstances, as the company had built its road close to the house, and was aware that the family resided there, I cannot say that it was error. Owing to the danger

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at that particular place, made so by the company's act, a corresponding diligence devolved upon it.

Upon a full review of the whole record, I cannot see any such error as would justify a reversal.

Judgment affirmed; all the judges concur.

JOHN A. GIST and AUSTIN CRAIG, Respondents, vs. SAMUEL G. LORING, Appellant.

- Instructions—Refusal of, proper, when.—Declarations of law not applicable to the facts of a case, although abstractly correct, are properly refused.
- Practice, civil—Witnesses—Credibility of, etc.—The trial court is the proper judge of the credibility of witnesses.
- 3. Justices' courts, replevin in—Failure of statement to show cause of action—Amendment of statement in Circuit Court.—In a replevin suit brought before a justice of the peace under the "claim and delivery" act (Wagn. Stat., 817,) where the statement fails to allege that the property was detained by defendant, and that it had not been seized under any process, execution or attachment, etc., it shows no cause of action upon which process can issue; and such statement cannot be amended in the Circuit Court.

Appeal from DeKalb Circuit Court.

S. G. Loring, for Appellant.

J. D. Strong, for Respondents.

Napron, Judge, delivered the opinion of the court.

This was an action for a saddle estimated at the value of \$8. The suit was brought under the 3rd article of the justice act concerning "a claim and delivery of personal property." (Wagn. Stat., 817.)

When the case reached the Circuit Court a motion to dismiss was made, and during its pendency the plaintiffs applied for leave to amend. This leave was granted; and as this involves a very prominent point in the case, it is necessary to copy the statement before the justice, which was in these words:

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"Plaintiffs state that they are lawfully entitled to the possession of a certain saddle, once the property of John Fisher, of the value of \$8; that the same was on or about the 1st of June, 1872, unlawfully taken, and is now wrongfully detained at the county aforesaid, and that plaintiffs are in great danger of losing said property unless taken out of defendant's possession. Plaintiff further states, that for the taking and detention of said property, and for all injuries thereto, he is damaged ten dollars. Wherefore plaintiff prays judgment for the recovery of said property, and ten dollars damages for the taking and detention thereof, and all injuries thereto." (Signed, Austin Craig, one of the plaintiffs, who makes oath that the facts and allegations in the above statement are true.)

It is impossible to say from the transcript sent here whether there were one or two plaintiffs in this statement filed with the justice. As the case involved eight dollars, and was thought to be of sufficient importance to be brought to this court, some reasonable degree of accuracy in this respect might be looked for.

The amended statement filed in the Circuit Court, is this: "Plaintiffs, for amended statement, say that they are doing business together, and known under the firm name of Gist & Craig, and are equal partners in a general farming, butcher and grocery business, in the town of Maryville, and that they are lawfully entitled to the possession of a certain saddle, once the property of John Fisher, and known as the N. C. Ford saddle, of the value of eight dollars; that the same was on or about the 1st day of June, 1872, wrongfully detained by the defendant, and that the said saddle has not been seized." etc., pursuing the exact words of the statute.

There was a trial in the Circuit Court without any jury, and a bill of exceptions preserves the evidence and the declarations of law made by the court.

The evidence shows that one Fisher sold a horse and saddle, confided to him by Ford, the owner, to one of the plaintiffs for fifteen dollars; and after deducting ten dollars, the cost of keeping the horse, he divided the five between himself and Ford.

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The evidence of the defendant showed that Fisher had no such authority, and undoubtedly never delivered the saddle to the plaintiffs, or either of them; that defendant bought the saddle from Ford, who delivered it to him at the time he bought; that he paid a valuable consideration for it, and knew nothing of any claim of plaintiffs.

There was no evidence whatever to show that the saddle was ever delivered to plaintiffs by Ford; but evidence was given to show Ford's general character to be bad.

The instructions or declarations of law made by the court, are of no importance to the decision of this cause here. They are mere abstractions, and were undoubtedly correct. The verdict found by the court is against the evidence, as we understand it, but the court could appreciate the credibility of witnesses better than we can, and this is no ground for a reversal of the judgment.

But the statement filed with the justice is not in compliance with the law, and no process could have been issued upon such a statement. No cause of action against the defendant is alleged. Passing by the vague description of the property, it is not alleged that the defendant detained it, and there is no allegation that it had not been seized under any process, execution or attachment, etc.

In ordinary cases before justices, we have uniformly upheld the power and duty of the Circuit Court to allow amendments, where the cause of action before the justice is not substantially changed. But the statement filed with the justice in this case, under the 1st section of art. 3, omits two of the six clauses expressly required to be verified by affidavit, before an order could be issued to the constable for seizing and delivering the property. The amended petition filed in the Circuit Court is therefore substantially a new action, and affords no justification for the exercise of the power confided to the justice, upon special grounds carefully set forth in the act.

It is not meant as any reflection upon the legislative department of the government, to say that such controversies

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ought to be excluded from this court, since this court decided, when its docket did not amount to a hundred cases a year from the whole State, that the legislature had no power to impose such restriction, and the same principle of course holds good when the docket reaches one thousand cases a year.

The judgment is reversed and the cause dismissed.

THE STATE OF MISSOURI, Respondent, vs. Loren J. Edwards and William D. Edwards, Appellants.

 Practice, criminal—Indictment—Selling liquor without license—Burden of proof.—In indictments for selling liquor without license, the onus is on the accused of showing authority to sell.

2. Selling liquor without license—Indictment for—Joinder, improper, when—No ground for reversal, when.—Persons may be jointly indicted for selling liquor without license, but there should be no joinder in the absence of proof showing a common design or concert of action. Where, however, notwithstanding the failure of such proof, it appears clearly that each of a number of defendants so jointly indicted are guilty of acts which would warrant a separate indictment and conviction, the misjoinder does not work such "prejudice to the substantial rights of defendant upon the merits" (Wagn. Stat., p. 1091, § 27,) as to warrant the interference of the Supreme Court.

Appeal from Davies Circuit Court.

Wm. M. Rush, for Appellants.

I. The indictment is bad, being for an offense not jointly indictable. (Rex vs. Atkinson, 1 Salk., 382; Rex vs. Weston, 2 Strange, 623, cited in Arch. Cr. Plead. p. 55; Vaughan vs. State, 4 Mo., 530.)

Hockaday, Att'y Gen'l, for Respondent.

I. Defendants were jointly engaged in business as partners, and the act of one was the act of the other. If one made a sale in violation of law, then both are guilty. Where the agent sells, both principal and agent are liable to indictment.

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(State vs. Hays, 13 Mo., 246; State vs. Bryant, 14 Mo., 340; Id., 137.)

II. The indictment is good. (State vs. Wishon, 15 Mo., 503; Id., 506, 478; State vs. Sutton, 25 Mo., 300.)

SHERWOOD, Judge, delivered the opinion of the court.

The defendants were jointly indicted for selling liquor without a license. The indictment is well enough as to form.

Upon trial the defendants showed no authority whatever for the acts charged, and in this State the *onus* of doing this is cast on the party accused in cases of this character. (Schmidt vs. State, 14 Mo., 137; Wheat vs. State, 6 Mo., 455.)

There is now no doubt but that parties may be jointly indicted for the offense so specified in the indictment now before us. The case of Vaughn vs. State (4 Mo., 530), cited by appellant's counsel, and which seems to militate against this view, was based upon the idea that two persons could not be jointly indicted for exercising without license the trade of an auctioneer. But the law of that case appears to have been but lightly considered and has since been questioned and virtually overruled in subsequent decisions. (State vs. Gay, 10 Mo., 440 and cas. cit.; State vs. Presbury, 13 Mo., 342.)

There is no room, therefore, in the case at bar to doubt the sufficiency of the indictment on this point. In this case, however, the testimony showed, on the part of each defendant, distinct and independent violations of the license law, and did not exhibit any common design or concert of action in their individual infractions of that statute. Under such circumstances there should have been no joinder. (1 Whart. Cr. Law. §§ 430, 432, and cas. cit.)

Thus it has been held, that "if A. & B. are jointly indicted and tried for gaming, and the evidence shows that A. and others played at one time, when B. was not present, and B. and others played at another time when A. was not present, no conviction can be had against them." (§ 430, supra.)

In England, the practice has prevailed—subject, however, to the discretionary power of the court to direct the indict-

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ment to be quashed-to indict a number of persons for several offenses of the same nature, but there it must be laid separaliter; or, otherwise, the indictment thus framed will be quashed. The word separaliter is held to make an indictment drawn in this manner tantamount to "several indictments;" (Rex. vs. Kingston, 8 East, 41;) and by this method is obviated an objection like the one we have been considering to the present indictment. And, were it not for the latitudinous provisions of our statute in reference to practice in criminal cases (2 Wagn. Stat., § 27, p. 1090) we should hold that objection a fatal one; and that the conviction herein could not be upheld. But as the evidence clearly shows that the defendants were each guilty of an act, or acts, which would well have warranted their separate indictment and conviction, it is not seen that there is any such "defect or imperfection" in conducting the prosecution against them, as has tended "to the prejudice of the substantial rights of the defendant, upon the merits." (State vs. Dalton, 27 Mo. 1; State vs. Craighead, 32 Mo., 561; State vs. Cox, Id., 566; State vs. Duclos, 35 Mo., 237; State vs. Willis, 37 Mo., 192.) Judgment affirmed; all the judges concur.

H. J. Robertson, Defendant in Error, vs. John Neal, Plaintiff in Error.

1. Dismissed for failure to file statement and brief.

Error to Clay Circuit Court.

D. C. Allen, for Plaintiff in Error.

John T. Chandler, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

In this case the plaintiff has failed to file any statement and brief as required by law. The writ will therefore be dismissed. The other judges concur. Sumner v. McCray, Garn.

- A. Sumner, Appellant, vs. Andrew F. McCray, Garnishee of Charles T. Westcomb and Joseph Carter, Respondent.
- 1. Wife's land in another State—Sale of—Proceeds of exempt from execution.— Where the husband, as agent of the wife, receives a check for the price given for the purchase of land owned by her prior to marriage, under the statute relating to married women (Wagn. Stat. 935, \$\frac{2}{5}\$ 14), the check is exempt from execution for his debts. And this is the rule although the lands are in another State.
- Practice, civil—Instructions.—Instructions not warranted by the evidence should be refused.

Appeal from Caldwell Circuit Court.

Crosby Johnson with M. A Low, for Appellant.

I. Our statute does not restrain the husband from collecting in and reducing to possession the choses in action of his wife. (Boyce vs. Cayce, 17 Mo., 47; Clark vs. Bank, 47 Mo., 17.) And it makes no difference whether the money or bond arises from the sale of her land or other property. (Tillman vs. Tillman, 50 Mo., 40.) If there is no particular agreement on the subject, but she voluntarily parts with her land and permits the cash avails of it to go into his hands, this cash is like any other which he receives during the coverture from her, absolutely his. (1 Bish. Mar. Women, § 605; Mahoney vs. Bland, 14 Ind., 176; Talbott vs. Dennis, 1 Ind., 471; Martin vs. Martin, 1 Const., 473; See 12 Ind., 170; 3 Ind., 545; Woodford vs. Stephens, 51 Mo., 443.)

J. M. Hoskinson, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

On a judgment in favor of plaintiff, against one Westcomb, defendant was summoned as garnishee. In his answer he stated that he had received a check from Westcomb, but was informed that it was the property of Westcomb's wife. Whether it was hers or not, so as to be liable for her husband's debts or otherwise, was the issue submitted to the court.

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The evidence ail showed that the money which the check represented was derived from the sale of land belonging to her in the State of Indiana; that the land was purchased by her with her own money long before her marriage, and that it was sold since, and that the check was for one of the instalments due thereon, and that her husband, in receiving and transferring it, only acted as her agent. The judgment was for the defendant.

Our statute provides that "the rents, issues and products of the real estate of any married woman, and all moneys and obligations arising from the sale of such real estate, and the interest of her husband in her right in any real estate which belonged to her before marriage, or which she may have acquired by gift, grant, devise or inheritance during coverture, shall during coverture, be exempt from attachment or levy of execution for the sole debts of her husband." (2 Wagn. Stat., 935, § 14.)

It is contended that the statute cannot govern the case, because the wife's land was situated in the State of Indiana, and the law was only intended to apply to lands lying in this State. But there is nothing in the law warranting any such construction. Its language does not import any such idea; and when we take into consideration the object and intent had in view, a conclusion directly to the contrary must be reached. No distinction is made. The law makers manifestly intended to secure to the wife, free from the control of her husband, all moneys arising from the sale of her real estate which she possessed before marriage, or which she acquired with her own money, obtained by gift, grant, devise or inheritance after marriage.

It is of no consequence in what jurisdiction the land was situated, the money arising from the sale thereof was designed to be secured to her. The money is in her hands, just as much, and the object in view is accomplished, whether the land was situated in this State or another.

The court did right in refusing the instructions in reference to the husband's reducing the money into possession, for there, was no evidence warranting them. Shaw, Adm'r, v. Groomer.

The judgment of the court was evidently right and should be affirmed, and with the concurrence of the other judges, it will be so ordered; the other judges concur.

THOMAS R. SHAW, ADM'R, ETC., of DANIEL GROOMER, SR., DEC'D, Appellant, vs. MARY JANE GROOMER, Respondent.

1. Probate Court—Affidavit charging embezzlement of estate of deceased person, filed by one not shown to have interest—Affidavit in Circuit Court by administrator—Change in cause of action.—Where one not shown to have any interest in the estate files an affidavit, charging another with embezzling the property of a deceased person, (Wagn. Stat., 85, § 7) the administrator cannot, on appeal of the case to the Circuit Court, appear there for the first time and file a new affidavit, and compel the party accused to proceed to trial thereon. Such action of the administrator would be the introduction of a new party and a change in the cause of action.

Appeal from DeKalb Circuit Court.

M. A. Low, with John Conover, for Appellant.

I. By appearing to the citation and submitting to an examination, the defendant gives the court jurisdiction of his person.

II. If the amendment was necessary, the court did not err in permitting the appellant to amend the affidavit.

The first affidavit was sufficient to notify, and it did notify, the defendant of the charge against her.

An affidavit for an attachment may be amended after an appeal from the judgment of a justice of the peace, and there is no good reason why an equally liberal practice should not obtain here.

H. C. McDugall, with Strongs & Hall, for Respondent.

I. The filing of the "amended affidavit" in the appellate court was a confession that the original affidavit did not state a cause of action; and was an abandonment of the original statement; and being made by another party in the appellate

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court, was wholly unauthorized by law. (Price vs. Halstead, 3 Mo. 461; Dameron vs. Dameron, 19 Mo., 317; Howell's Ex'r vs. Howell, 37 Mo., 124; Powers vs. Blakely's Adm'r, 16 Mo., 437; Hook's Adm'r vs. Dyer, 47 Mo., 214. See also Webb vs. Tweedie, 30 Mo., 488; Hansberger vs. P. R. R. Co., 43 Mo., 196; Brashears vs. Strock, 46 Mo., 221.)

WAGNER, Judge, delivered the opinion of the court.

It appears from the record that one Burton made an affidavit stating that he had good reason to believe, and did believe, that the defendant had concealed in her possession and under her control, certain money belonging to the estate of Groomer, deceased, and that she refused to turn the same over to the administrator.

It is nowhere shown that Burton had any interest in the estate, or that he was authorized to make the affidavit according to the provisions of the statute. (Wagn. Stat., 85, § 7.)

The affidavit was defective in other matters, but a citation was issued and such proceedings were had in the Probate Court, that a judgment resulted in favor of the estate and against the defendant.

The defendant appealed to the Circuit Court, and in that court the administrator appeared, for the first time, and on his own motion filed a new affidavit, to which defendant ob-

jected and excepted.

Objections were then made to the introduction of any evidence in the cause; one of the principal reasons assigned therefor, being, that the filing of the affidavit by the administrator in the Circuit Court, was an abandonment of the said proceeding as originally instituted, and that the court had no authority or jurisdiction to hear and determine the cause on the second affidavit. The objection was sustained and the suit dismissed.

The only question presented for determination by the record is, whether the administrator could come into the Circuit Court, for the first time, and file an entirely new affidavit and compel the defendant to proceed to trial thereon. This quesShaw, Adm'r, v. Groomer.

tion must be answered by a construction of the statute in reference to appeals in administration cases from the Probate or County Courts.

The statute provides that "upon the filing of such transcript and papers, in the office of the clerk of the Circuit Courts, the court shall be possessed of the cause, and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the proceedings in the court having probate jurisdiction." (Wagn. Stat., 120. § 8.)

New errors, defects or other imperfections in the Probate Court, are to be disregarded, but the same cause is to be tried anew in the appellate court, that was tried in the court of original jurisdiction. In one sense, so far as the subject matter was concerned, i. e. the money, the cause was the same. Except in cases in rem, however, subject matter alone does not conferjurisdiction. In personal actions, jurisdiction over the parties is indispensably necessary. The administrator was not a party to the original proceeding and had no agency in instituting the same. When he appeared and filed his affidavit, it was the introduction of a new party, and changed the character of the action. He could not connect it with the defective affidagit made previously in the court below, which seems to be conceded, was unauthorized. His affidavit, then, was the same as if it had been originally filed as the institution of a new proceeding, and it could not be made in an appellate court.

We do not deny the proposition that affidavits are amendable, where they are not absolutely void; but this case has for its foundation a different basis.

The appeal is only allowed by the statute, and the trial and proceedings must be had in conformity with its provisions. A fair and just interpretation of the section permitting appeals, will not sanction the course of the plaintiff in this case.

Judgment affirmed; the other judges concur.

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LUCIEN E. CARTER, Appellant, vs. MARCUS E. HOLMAN, FRANK O. PETTIS, THOMAS H. COLLINS and AMANDA CORBY, Respondents.

Mortgage—Agreement to give will create a lien, how far.—It seems to be well settled, that an agreement in writing to give a mortgage, will create a lien upon the land specified in the agreement as against general creditors. (McQuie vs. Peay, 58 Mo., 58; Blackburn vs. Tweedie, post p. 505.) And it is proper to record such an instrument.

Conveyance inter partes—Sheriffs' sales—Accuracy of description—What necessary in two cases.—In the interpretation of deeds inter partes, courts are not inclined to insist upon that accuracy of description required in sheriffs' deeds

or other transfers of property in invitum.

2. Deed—Description of land in—Patent, ambiguity in—Identification of aliunde.—In an agreement for a mortgage of land the property was referred to
he "a farm owned by me in townships sixty-five and sixty-six of Worth county," * * * "south of Grant City, one and one-half miles." But neither
section nor range were given. It appeared that the maker of the agreement
lived in another county, and that the tract claimed to be that described by the
deed had no house upon it, and was not known as the farm of the maker, nor
generally understood to be his. Held, that the ambiguity in the description
was patent, and that the uncertainty was not cured by the evidence alimade.

Appeal from Worth Circuit Court.

L. E. Carter, for Appellant.

I. The agreement was properly recorded. (Wagn. Stat., 277, §§ 24, 25; 2 Sto. Eq. Jur., §§ 1018-20; 1 Hil. Mort., 4 ed., p. 648, et seq.)

II. It was in equity a mortgage. (Hil. Mort., supra; Read vs. Simmons, 2 Desaus., 552; Menude vs. Delaire, 2 Desaus., 564; Ex'r of Reed vs. Kenan, 3 Desaus., 74; Welch vs. Wusher, 2 Hill Chy., 167-170; Massey vs. M'Ilwain, 2 Hill Chy., 421-428; Dow vs. Ker, 1 Speed. Eq., 414-417; In the matter of Howe, 1 Page, 125-130; Bk. of Muskingum, vs. Carpenter, 7 Ohio, 21; Lake vs. Dodd, 10 Ohio, 415-425; Doe, Exr. Dan Burgess vs. Bank of Cleveland, 3 McLean, 140; Racinbillot vs. Sanservain, 32 Cal., 375; Peckham vs. Haddock, 36 Ill., 38; Sto. Eq. Jur., § 643, 8 ed., p. 61; Hill. Mort., vol. 2, 4 ed., p. 410, § 7; Moody vs. Wright, 13 Metc., 29, 30; Moody vs. Baker, 3 Mees & W., 195; Gale vs. Burnell, 7 Add. & Ell. N. R., 850; Hilly. Mort., 4 ed., vol. 1, p.

648; Id., p. 661, and note; Abbott vs. Godfrey, 1 Mann, [Mich.] 198; Davis vs. Clay, 2 Mo., 161; Doniphan vs. Paxton, 19 Mo., 288; Gill vs. Clark, 54 Mo., 415.)

III. The agreement is not void for uncertainty. If possible the intention of the parties as it appeared in the deed should govern its construction. (Abbott vs. Abbott, 51 Mo., 575; Lay vs. Wagoner, 47 Mo., 178; Bruensmann vs. Carroll, 52 Mo., 313; 2 Greenl. Cr. Tit. Deed, ch. 12, § 26; Rutherford vs. Traey, 48 Mo., 325; Jamison, Tr. vs. Fopiano, 48 Mo., 194; Dawes vs. Prentice, 16 Pick., 435; Block vs. Trout, 50 Me., 364; Winslow vs. Patten, 34 Me., [4 Red.] 25; Biddle vs. VanDeventer, 26 Mo., 500; Jackson vs. Clerk, 7 Johns., 216; Loomis vs. Jackson, 19 Johns., 449; Worthington vs. Hylyer, 4 Tyng, 196; Cro. C., 548, 473, 447; Gibson vs. Bogy, 28 Mo., 478; 4 Greenl. Cr., 307.)

If the deed describes the property with sufficient certainty to show what was intended to be effected or conveyed, it is good. (Brown vs. Hayes, 21 How., 306; Fenwick vs. Gill, 38 Mo., 510; Hardy vs. Mathews, 38 Mo., 121; Rutherford Tracy, 48 Mo., 325; Cooley vs. Warren, 53 Mo., 166; Nelson vs. Broadhack 44 Mo., 596; Bruensmann vs. Carrol, 52 Mo., 313; 3 Wash. Real Prop., p. 344, 345, 346, 347, and authorities cited; Comm. vs. Roxbury, 9 Gray, 490; Schultz vs. Lindell, 40 Mo., 330, 355; Jennings vs. Brizeadine, 44 Mo., 335; Seaman vs. Hogeboom, 21 Barb., [S. C.] 398.)

The designation, together with the identification of the land aliunde was sufficient. (Doolitle vs. Blakesley, 4 Day, 265; Stanley vs. Green, 12 Cal., 148; Carson vs. Ray, 7 Jones L. [N. Cr.] 609; Abbott vs. Pike, 33 Me., 204; Cravens vs. Pettit, 16 Mo., 210; Walsh vs. Ringer, 2 Ham., 327; 4 Monr., 63; Clark vs. Powers, 45 Ill., 283; Dougherty vs. Purdy, 18 Ill., 207-8; Fitch vs. Gosser, 54 Mo., 267; Bates vs. Bower, 17 Mo., 550; Means vs. La Vergne, 50 Mo., 343; Hamilton vs. Doolittle, 37 Ill., 473; Prettyman vs. Walston, 34 Ill., 175; Jamaica vs. Chandler, 9 Allen, 159; Hart vs. Rector, 7 Mo., 531; Burnham vs. Banks, 45 Mo., 349; Stribler vs. Schreiber, 36 Vt., 345; Dodge vs. Nichols, 5 Allen, 548.)

IV. The requiting was notice. (1 Johns. Chy., 394.)

Murat Masterson, for Respondents.

I. The deed is void for uncertainty. (Boardman vs. Reed, 6 Pet. U. S.; Greenl. Ev., §§ 297, 301; Phill. Ev., 749, 780; Stark. Ev., 546; Jackson vs. Ransom, 18 John., 107; Thomas vs. Thomas, 6 John., 671; Jackson vs. Delaney, 13 John., 557; Haight vs. Pond, 10 Conn., 255; Bell vs. Dawson, 32 Mo., 87; Clemens vs. Rannells, 34 Mo., 583; Evans vs. Ashley, 8 Mo., 178; Wash. Real Prop., 3 Vol., 344; Nelson vs. Brodhack, 44 Mo., 603.)

II. The instrument was not a conveyance of realty, nor such an instrument as the law authorizes to be put on record. (Wagn. Stat., 277, § 24; p. 275, § 14.)

NAPTON, Judge, delivered the opinion of the court.

The only question in this case depends on the construction of the following instrument, which was duly acknowledged, signed and recorded in Worth county, on the 1st day of December, 1869. There was a subsequent levy on the property alleged to have been described, and a subsequent deed of trust; and the only question is, whether the paper hereinafter stated constituted a mortgage or lien, so as to give it priority over subsequent creditors and purchasers. The paper in question was as follows:

"Know all men by these presents, that I, Marcus E. Holman, of Andrew county, am held and firmly bound unto Lucien E. Carter, of St. Joseph, in the penal sum of \$500, for the payment of which, well and truly to be made, I bind my-

self, heirs, executors," etc.

"The condition of this bond is, that, whereas the said Carter holds five promissory notes against me, of one hundred dollars each, dated July 27, 1869, and due respectively in four, five, six, seven and eight months after the date thereof. Now, if I, the said M. E. Holman, shall make, execute and deliver to said L. E. Carter a good and valid deed of trust or mortgage on a farm owned by me, free of all encum-

brance, in townships sixty-five and sixty six, of Worth county, State of Missouri, to secure the payment of three of said notes within the next thirty or sixty days, I being liable as the maker on all of said notes, and being unable to execute said mortgage at this time on said land, for the reason that I cannot recollect the number of the section and range of the same sufficiently to describe said land in a mortgage which I am to give said Carter, then these presents shall be null and void and of no effect, otherwise to remain in full force and virtue in law. The land herein described lies south of Grant City, about one or one and a half miles, to which I attach this as a lien, for the performance of this agreement," etc.

The plaintiff in his petition claims a lien on the south half of the south west quarter of section five, town, sixty five, range thirty-one, in Worth county, as being the land described in the above obligation.

The bill of exceptions states, that the plaintiff gave evidence tending to show that the land described in his petition was the land intended to be described in the bond or writing obligatory heretofore set out. The evidence is, however, not set out in the bill of exceptions.

The defendant then read the deposition of Mrs. Corby, which need not be noticed further, as it simply stated that she knew nothing whatever personally of the transaction, having an agent, named Culligan, to manage all her pecuniary affairs.

Culligan was then examined. His explanation of the matter is this: As agent for Mrs. Corby he had a deed of trust on Pettis' land in the bottom in Buchanan county, for \$850. Pettis and Holman were about to exchange lands, and Pettis being unable to pay off the mortgage on his land in Buchanan, proposed to Culligan to relieve his land in Buchanan of this lien, and take in lieu thereof a mortgage on the land in Worth county, which he understood to be the south half of the south west quarter of section five, township sixty-five, range 31, and the north half of the south half of lot No. 2, of the south west quarter of section seven, in the

same township and range. The proposal of Pettis was agreed to, upon condition that the land in Worth county was free from incumbrance.

A few days afterwards Pettis came to the witness' office, stating that he had been up to Grant City to look at the land, and searched for incumbrances, and gave him a certificate which the bill of exceptions states is marked "A.," but which is not in the record. This certificate, it may be inferred, was from the clerk of Worth county; but it is not copied, and, therefore as in the case of the plaintiff's evidence, leaves everything to conjecture.

It may be remarked here, that in cases tried by juries on instructions, or common law cases as they are usually termed, details of evidence are unnecessary, and therefore a mere statement of its tendency on either side is sufficient; but in chancery cases, where it is expected that the court will review the testimony, the evidence at large may be important.

The amount of the deposition of this witness was, that he had no knowledge of any incumbrance; he knew nothing of plaintiff's lien; he relied on the certificate above referred to, which he states was a certificate of the clerk of the county.

Holman, the defendant, lived in Buchanan county, about two miles south of St. Jo. He intended to give a lien on the east half of the north west quarter of section six, town. sixty-five, range thirty-one. He had no intention of giving a mortgage on what he calls his home place; that he afterwards sold that to Pettis. The reasons for this are explained, but immaterial. There was no house on this land, but part of it was cleared. He brought a written line from the clerk of the court of Worth county, stating that he had examined the books in Worth county, and found the Worth county land clear of incumbrance. He claimed two eighty acre tracts and one twenty acre tract, all derived from different sources.

Upon the testimony the court decided that the instrument of writing sued on, in itself, was not a mortgage or lien in law or equity, except perhaps as against Holman, and that the filing thereof and recording the same imparted no notice

to defendants, nor to any subsequent purchaser of any incumbrance; that said bond was not a conveyance or such an instrument as was authorized to be recorded. And the court gave final judgment for the defendants.

The doctrine of equitable mortgages, or liens arising from agreements or implied from a deposit of title deeds, is one of the creations of courts of equity which it is difficult to define or explain. It seems to be settled, however, that an agreement in writing to give a mortgage, will create a lien on the property specified in the agreement, as against general creditors.

Most of the cases in this country seem to be traceable to the case of Delaire vs. Keenan, (3 Desaus., 74, which is not here accessible) and Chancellor Desauessure referred to Lord Cowper's opinion in Finch vs. The Earl of Winchelsea, (1 Pierre Wil., 283.) Lord Cowper there said, "Articles made for a valuable consideration and the money paid, will, in equity bind the estate and prevail against any judgment creditor mesne between the articles and the conveyance;" and this is all that was said on the subject, for the chancellor decided that, as the consideration was inadequate, he would disregard the agreement as against a judgment creditor.

Upon this opinion of Lord Chancellor Cowper has been established the doctrine that an agreement for a mortgage has in equity a specific lien, and that the mortgagees were entitled to a preference over subsequent judgment creditors. (1 Paige, 130; 32 Cal., 375; 1 Hill. Mort., 648; McQuie vs. Peay, 58 Mo., 58; Adams Eq., 123 and note.)

It may be considered, therefore, that the bond in this case was properly recorded, as it purported to affect land in the county where it was recorded, and the only question is, whether the description of the land was sufficiently accurate to convey notice. The only description of the land is, "a farm owned by me in townships sixty-five and sixty-six, south of Grant City one or one and a half miles."

It seems from the testimony that the recorder gave a written certificate that there was no incumbrance on the land purchased by Pettis.

Courts have gone very far in supporting equitable mortgages, but in such cases there has been no dispute as to the land intended to be charged with the lien. It has also been the intention of courts to support deeds *inter partes*, and in their interpretation not to require the accuracy of description required in sheriff's sales, or other transfers of property made without the consent of the owner. It is unnecessary to quote authorities on this point. They are familiar to the profession, and have been recognized in this court in several cases.

This court has gone very far also in supporting sales by sheriffs, as may be seen by reference to the opinion in Mc-Pike vs. Allman, (53 Mo., 551) and the authorities therein eited and commented on.

The words in the bond, "the farm owned by me one and one half miles south of Grant City," may be rejected as conveying no information whatever. It appears very clearly that Holman lived in Buchanan county, and that the place he describes as owned by him had no house on it, and was not at all known in the neighborhood or generally understood to be Holman's farm, or called by that name. The only description of the land is, that it was in townships sixty-five and sixty-six. No section or range is given. Townships contain thirty-six sections of land, and each section contains six hundred and forty acres. Bacon says: "There be two sorts of ambiguities of words; the one is ambiguitas patens, and the other latens. Patens is that which appeareth to be ambiguous upon the deed or instrument; latens is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth ambiguity."

This description seems to fall within the explanation of a patent ambiguity. This land is described as in two townships, either of which would contain thirty-six times six hundred and forty acres, or upwards of twenty thousand acres. It is impossible, on the face of the deed, to locate the land, and so the clerk of the county decided, when he gave a cer-

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tificate that there was no incumbrance on the land conveyed to the defendant Pettis.

And we think his opinion was right, and we shall therefore affirm the judgment of the Circuit Court; the other judges concur.

THOMAS BLACKBURN, Respondent, vs. DAVID TWEEDIE, Appellant.

- 1. Equitable mortgage on land—Agreement by owner to give occupancy of land in lieu of interest on sum borrowed.—A written agreement by the owner to pay the occupant of certain land a given sum, conditioned, that when the land was sold to enable the owner to realize the amount, the occupant should surrender his possession, and meantime giving him the occupancy in lieu of paying him interest on this sum, was held to constitute an equitable mortgage, and amounted to a specific lieu on the land; and any one buying with notice of the agreement would take subject to it.
- Agreement will constitute equitable mortgage, when.—An agreement to give a
 mortgage, a mortgage defectively executed, or an imperfect attempt to create
 a mortgage or to appropriate specific property to the discharge of a particular
 debt, will create a mortgage in equity or a specific lien on the property so
 mortgaged. (See McQuie vs. Peay, 58 Mo., 58-9; Carter v. Colman, ante
 p. 498.)

Appeal from Carroll Circuit Court.

L. H. Waters, for Appellants.

I. If it may be implied from a written agreement, that the land is to be chargeable with, or security for a debt, it amounts to an equitable mortgage, (2 Sto. Eq. Jur., § 1020, 1 Hil. Mortg. 647, § 1; Chase vs. Peck, 21 N. Y., 583; Neil. Eq. Mortg., 218, n.; Ad. Eq., 313 & n.; Russell vs. Russell, 1 Lead. Cas. Eq., 2 Am. Ed., 499, and authorities cited at the end of note,) and the mortgage may arise without a deed or special contract. (4 Kent. Com., 11 Ed., 164.)

Ray & Ray. with W. P. Hall, for Respondent.

Blackburn v. Tweedie.

I. The instrument does not constitute an equitable mortgage. It neither confers a lien nor creates a title to the land. The possession was not taken and delivered under the contract, but existed before.

II. The trust, if any, is at most, a personal trust reposed in the good faith of John Tweedie, and not a property trust fastened by its terms upon the land itself and following it,

into whose hands soever it may pass.

III. But, if it should be held to be an "Equitable Mortgage" then it is not good against the plaintiff unless he had "actual notice" thereof, at the time of his purchase. And in this case he had no notice actual or constructive.

WAGNER, Judge, delivered the opinion of the court.

This was an action of ejectment in the ordinary form to recover possession of certain lands described in the petition.

In addition to a denial of the averments in the petition, the answer set up an equitable defense and claimed that defendant went into possession of the premises, under a written agreement made with one John Tweedie who was plaintiff's grantor and owned the lands at the time, and that by that agreement, defendant was to retain possession till John Tweedie sold the same and paid him the sum of nine hundred dollars, and that he was to have the use of the lands in lieu of interest on the sum due him; that in pursuance of that agreement he took possession of the land and remained in possession till the commencement of this suit.

The agreement relied on stated that John Tweedie agreed to pay David Tweedie the sum of nine hundred dollars, on the conditions that whenever the land occupied by David Tweedie (which was the land in controversy) was sold by John Tweedie to enable him to realize the above amount of nine hundred dollars, then David Tweedie agreed to give to John Tweedie possession of the land occupied by him. David Tweedie agreed to help put up the fence around the land and this work and occupying the land, were to be an

off-set to the interest on the nine hundred dollars.

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The cause was tried before the court sitting as a jury, and for the plaintiff the court declared the law to be, that the agreement was not such an instrument as gave, or could confer upon David Tweedie any lien on the land or interest thereon, and that it was no defense to plaintiff's right of recovery.

The defendant requested a declaration that the instrument read in evidence by defendant, amounted to an equitable mortgage, and under it, defendant had a lien on the land in question as against John Tweedie and his grantees with notice, and the same would only be void as to subsequent bona fide purchasers for a valuable consideration. This declaration the court refused to give, and then rendered its verdict for the plaintiff.

There was evidence introduced by the defendant tending to show that plaintiff purchased with a knowledge of the existence of the agreement, and that he knew that defendant was in possession. Plaintiff submitted evidence of a contrary tendency. As the case was treated in the court below as an action at law, and as it must go back, we will not at present look into the question of notice.

An agreement in writing to give a mortgage, a mortgage defectively executed, or an imperfect attempt to create a mortgage or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien on the property so mortgaged. (McQuie vs. Peay, 58 Mo., 58.) The agreement, we think, was sufficient to create a mortgage in equity and amounted to a specific lien on the land. That there was an attempt to appropriate the property to the . discharge of the particular debt is manifest. It was even more than an ordinary mortgage in equity under our law, for it gave the equitable mortgagee the possession; and instead of compelling him to account for the rents and profits as is generally the case, it allowed him to retain the possession for the interest due him on his debt, and for certain work, which he performed without regard to the question whether they were equal to the rents and profits or not.

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The real intention of the parties as exhibited by the written agreement, seems to have been that the land was to be charged with the payment of the debt, and that the creditor was to keep the possession till the debtor sold the land and made satisfaction.

Any person buying, with notice of these facts, would take subject to them, and he would know that he could not obtain possession till the prior lien was discharged. It would therefore be his duty before he could obtain a clear title, and the right to the possession to see that the debt was satisfied.

The court erred in its decision and its judgment should be reversed and the cause remanded; the other judges concur.

W. B. Martindale, Appellant, vs. Kansas City, St. Joseph and Council Bluffs Railroad Company, Respondent.

- 1. Railroads—Failure to transport passenger to old depot—Knowledge of change by passenger—Contract held to be made in reference to change, when.—In suit against a railroad company for failing to carry plaintiff to its original depot, where it appeared that the company had abandoned its old depot for one, half a mile short of that terminus: Held, 1st. That although the change had been adopted only a few weeks prior to his purchase of ticket, yet, the running of the trains having been uniformly to the new depot since that change, will be considered as a usage of the company, in reference to which plaintiff must be held to have contracted. That a fortiori, such is the case where plaintiff knew of the change at the time of procuring his ticket; 2nd. That the question whether defendant had violated statutory requirements could not be raised in such a suit.
- 2. Corporation, illegal act of—When may be investigated by private citizen, collaterally.—The only exception to the rule which prohibits collateral inquiry by a private citizen into the supposed illegal acts of a corporation, is where such investigation is expressly authorized by the legislature.

Appeal from Andrew Circuit Court.

Ray, Harlan & Martindale, for Appellants, cited in argument, Sto. Bailm., 6th. ed., p. 606, § 600; Dudley vs. Smith, 1 Campb., 186; Weed vs. S. & S. R. R., 19 Wend., 534;

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Ker. vs. Mountain, 1 Esp., 27; 21 Ill., 176; 43 Ill., 513;
13 Wend., 611, 627-8; Porter vs. Steambt. New England,
17 Mo., 290; Marony vs. Old Colony R. R. Co., 106 Mass.,
153.

Hall & Mossman, for Respondent, cited 2 Pars. Cont., 472, 498 and note, 499, 500, 536 to 547 and notes; Id., 187 and note, to same, and 188; Chitty Cont., 873; S. W. F. and C. P. Co. v. Stannard, 44 Mo., 71; Martin vs. Hall, 26 Mo., 386; Soutier vs. Kellerman, 18 Mo., 509; Whitmore vs. Coats, 14 Mo., 9; 2 Redf. Railw., 135, § 184 and notes; 25 Wend., 660; 37 Mo., 472; Ch. & Alton R. R. Co. vs. Randolph, 53 Ill.; Lackland vs. N. M. R. R. Co., 34 Mo., 259; 1 Bibb., [Ky.], 292-3; 7 Cowen, 609; 1 Handy, 52.

Sherwood, Judge, delivered the opinion of the court.

The plaintiff bases his complaint on several alleged breaches of contract on the part of defendant, consisting in a failure and refusal to receive and carry plaintiff from its old depot in the town of Savannah to other points on its road; and consisting also in a like failure and refusal to carry him from other points on its road to such old depot, whereby plaintiff, to his damage, was compelled either to walk, or pay omnibus fare to, and from the new depot, a half mile distant from the old one, where the tickets were sold.

The evidence showed that plaintiff, at the time of purchasing the several tickets, was aware of the fact that defendant, after the removal of its track between Savannah and St. Joseph had discontinued the use of its old depot at the former place, except for the receipt and discharge of freight; and had been accustomed, since laying another track, to both receive and discharge passengers, at its new depot.

Under such circumstances, the knowledge of the plaintiff as to the interpretation of the contract by the defendant, and of its regulations in conformity with such interpretation, must be regarded as entering into and forming part and parcel of that contract, if we are to give heed to numerous adjudica-

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tions on the point. (Wann vs. West Union Tel. Co., 37 Mo., 472 and cas. cit.; Whitmore vs. Coats, 14 Mo., 9; 2 Pars. Contr., 535, et seq., and cas. cit.; Stannard vs. S. W. F. & C. P. Co., 44 Mo., 71.)

Nor was it material, that the defendant's trains had been running only a few weeks, and since the change of their track, from their new depot, as the true test in all these cases, is, that the usage, of however recent date, has existed uniformly and for a sufficient length of time, to raise the presumption that the contract was made in reference to it. (Smith vs. Wright, 1 Caines, 43; 2 Pars. Contr., 540, 542.)

But in this case there is no room for speculation or controversy as to the intention of the contracting parties; for the testimony plainly shows that plaintiff had full knowledge of the manner in which defendant had been accustomed to run its trains since laying the new track, and therefore, made his contract with the defendant with his eyes open, and in full possession of the meaning that contract was designed to import.

As to whether the defendant has been guilty of a violation of statutory requirements in failing to retain its old depot at Savannah, as the point of departure and arrival of its passenger trains, is a question which cannot be raised in this collateral method of procedure. (Shewalter vs. Pirner, 55 Mo., 218, and cas. cit.; Land vs. Coffman, 50 Mo., 243; Chambers vs. City of St. Louis, 29 Mo., 576.) And the only exception to this rule which prohibits collateral inquiry by a private citizen into the supposed illegal acts of a corporation, is where expressive legislative permission is granted therefor. (N. M. R. R. Co. vs. Winkler, 33 Mo., 354; Christian University vs. Jordan, 29 Mo., 71.)

Judgment affirmed; all the judges concur.

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SAMUEL ENSWORTH, Respondent, vs. GUY C. BARTON, Appellant.

1. Practice, civil—Allegata and probata—Claim for conversion of note, and proof of failure to pay pro rata proceeds, etc.—Under a petition charging the trover and conversion of a note, plaintiff cannot show that defendant was trustee appointed to collect the note and distribute the proceeds among the creditors of the maker, and failed to pay over to plaintiff his proportion of the amount.

Appeal from Buchanan Circuit Court.

W. H. Sherman, for Appellant.

I. Plaintiff brought his suit in trover, and recovered judgment upon a special contract. This cannot be done, even under the generous rules of practice provided by the code. (Wagn. Stat., 1058; Harris vs. Han. & St. Jo. R. R. Co., 37 Mo., 307; Robinson vs. Rice, 20 Mo., 229; Beck vs. Ferrara, 19 Mo., 30; Duncan vs. Fisher, 18 Mo., 403; Link vs. Vaughn, 17 Mo., 585; Ransom vs. Wetmore, 39 Barb., 104; 1 Chitty's Pl., 154.)

A. H. Vories, for Respondent.

I. As the case was tried by the court and developed by the testimony, the only question involved was, whether the defendant had received any money for the use and benefit of plaintiff, and if so, how much. And if under that view there was either evidence offered, or instructions given or refused, on any other theory they were wholly immaterial to such issue, and this court will not reverse when substantial justice has been done between the parties. (Rapp vs. Vogel, 45 Mo., 524; Rowell vs. City of St. Louis, 50 Mo., 92; Harris vs. Hays, 53 Mo., 90; State vs. Bailey, 57 Mo., 131.)

NAPTON, Judge, delivered the opinion of the court.

The petition in this case was as follows: Plaintiff states, that in the year 1866, on or about that time, the firm of Farris & Short executed their note payable to Thomas D. Mackay or order, for about \$900, with interest from date, in consideration of their indebtedness to him. The exact date,

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amount thereof, or time of payment, or rate per cent. interest, is not known to plaintiff, as he never saw the note. He further states that after said note became due, to-wit: the last of the year 1866, the said Mackay sold said note to plaintiff, for a valuable consideration. He further states that said Mackay sent said note to the firm of Woolworth & Barton (defendant being one of said firm) for collection, who received the same; that said firm was advised and notified that said note was the property of plaintiff, and that they were to account to him for said note or its proceeds. He further states that when said note was so sent to the firm of Woolworth & Barton, there was due on said note upwards of \$1,000. He further states, that in the spring of 1869, he made of the defendant and Woolworth a demand, and they refused and failed to deliver the note to plaintiff. He also demanded of them the proceeds of said note, if collected, which they refused to account for, denying that they had collected the same. He further states that said note bore interest, as he has been informed, at the rate of 18 per cent. per annum, and said note was made in the State of Kansas, where such interest was by law legal. The plaintiff further states, that defendant and his partner, in a settlement of their transactions with the firm of Farris & Short, before said demand, used said note and obtained a credit for the same in said settlement, and converted it to their own use. Wherefore he prays judgment for the amount of said note and interest, in the way of damages.

To this petition there was an answer, denying every allegation, and setting up the statute of limitations of five years as a bar.

A replication was filed, stating that defendant, before the expiration of the five years, left the State and has never returned.

The facts in the case, which the plaintiff's evidence tended to establish, and which under instructions from the court, the verdict of the jury may be regarded as finding, were about these:

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From 1862 to 1869, the house of Woolworth & Barton was engaged in a general freighting business on the plains. In 1865 or 1866, the firm of Farris & Short was engaged in the same trade. Farris & Short bought of Mackay a large number of cattle for freighting purposes, and paid him for them, excepting the sum of \$700 or \$800, for which they gave their note. Farris & Short were unsuccessful, and failed. The firm of Woolworth & Barton had advanced largely to them. It was agreed among the creditors of Farris & Short, that the cattle, mules and wagons and other property of said firm, should be turned over or assigned to Woolworth & Barton, who would sell them and apply the proceeds to a pro rata payment of their creditors. This is the tendency of plaintiff's proof, though Woolworth & Barton deny that they were to pay anything to the creditors of Farris & Short, until they had sold enough to satisfy their own claims. However this may be, and upon this point the evidence was irreconcilable, it is clear that the case which the plaintiff, by evidence, sought to make out, was based on an alleged failure of defendant to account to him for his share of the proceeds of property which they sold as trustees or assignees of an insolvent firm.

The testimony of Mackay and of Short, in regard to the note and the terms of the assignment to defendants, was obviously illegal. The note was never produced although the plaintiff's witness, Short, said it was in his possession, and the same witness stated that the agreement among the creditors of Farris & Short was in writing, and there was no proof offered to show that such agreement was destroyed or lost. It is strange that such material facts as these should be left to the loose statements of witnesses, when the note and the agreement could have been produced.

As the case must be remanded, on account of the admission of testimony clearly illegal, the question in regard to the admissibility of all the plaintiff's evidence under his petition might be passed by. Objection was made to it as the case

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progressed, and the question was again presented by an instruction.

The case proved, or attempted to be proved, by the evidence, was certainly not the case stated in the petition.

It is difficult to determine under our Practice Act, what degree of liberality courts are required to extend to parties in regard to their pleadings. In section 23, (Wagn. Stat., 1037) it is declared that "it shall be the duty of the courts to so construe the provisions of law relating to pleading, and amending the same, and to so adapt the practice thereunder, as to discourage, as far as possible, negligence and deceit, to prevent delay, to secure parties from being misled, to place the party not in fault as nearly as possible in the same condition he would have been if no mistake had been made, and to afford known, fixed and certain requisitions, in place of the discretion of the court or the judge thereof."

The 3rd section of the same article says, that "the court may at any time before final judgment in furtherance of justice, and on such terms as may be proper, amend any record, pleading, process, entry, return or other proceeding by adding," etc., and "by conforming the pleading or proceeding to the facts proved." As no proposal was made to the court in this case to amend the pleadings, it is unnecessary to determine the proper construction of this section.

The cause of action stated in the petition, and the one attempted to be proved were different. The petition stated the conversion of a note belonging to plaintiff, by the defendant to his use. The proof was that such conversion was proper, and in accordance with the contract, and that the real claim of plaintiff was, that the defendant did not account for such collection of the note, as by agreement he was bound to do. In other words, the claim of plaintiff was on account of money received by defendants, as trustees, for the creditors of Farris & Short, of whom the plaintiff was one, or the assignee of one. (Harris vs. Han. & St. Jo. R. R., 37 Mo., 307.)

It may be that defendants were not misled by the evidence introduced by plaintiff. We will reverse the judgment, however, for error in the admission of testimony.

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In regard to a change of the pleadings, it is only necessary to say that the evidence was designed to show a breach of a special contract—a failure of defendants to comply with a trust. The petition charged a conversion of the note and its proceeds to defendant's use.

Under our practice act the plaintiff ought to, at least, state the facts and his ground of complaint arising on the facts. The petition in this case is simply a declaration in trover, under the common law, for the conversion of a note, and a judgment is asked for the note or its proceeds. The evidence adduced on the trial was designed and tended to show an entirely different cause of action.

The judgment is reversed and the cause remanded; the other judges concur.

STATE OF MISSOURI, TO USE OF JOSIAH CROM, Plaintiff in Error, vs. C. C. SMITH, JOHN CLARK, et al., Defendants in Error.

1. Practice, Supreme Court-Filing of brief, etc.-Where plaintiff in error fails to file statement and brief, as required by statute, the writ will be dismissed.

Error to Holt Circuit Court.

T. H. Parrish, for Plaintiff in Error (Att'y of record).

Dungan, Zook & Van Buskirk, for Defendants in Error.

Hough, Judge, delivered the opinion of the court.

The plaintiff in error having failed to file a statement and brief, as required by the statute, the writ of error in this case is dismissed; the other judges concur.

LIVINGSTON COUNTY, Plaintiff in Error, vs. HANNIBAL & St. JOSEPH RAILROAD COMPANY, Defendant in Error.

- 1. Railroad tax—Charter of Han. & St. Jo. R. R.—Act of Sept., 1852, not an irrepealable contract—Liability of road for State, county and school tax.—1. Under the act of September 20th, 1852 (Sess. Acts 1853, p. 15), the Han. & St. Jo. R. R. Co. was exempt from State taxation, except as provided in section 3 of that act. But the act was not a contract between the State and the road, such as could not be altered or repealed by subsequent legislation. (State vs. Han. & St. Jo. R. R., ante p. 143.) 2. The exemption of the road under its charter of 1849 from county taxation, still remains in force. 3. Under the above acts the road is not exempt from school taxes.
- 2 Revenue—Railroad taxation—Section 3 of act of March 10th, 1871, not retrespective.—Section 3 of the act of March 10th, 1871, touching taxation of railroads, (Sess. Acts 1871, p. 56) provided only for the assessment and collection of taxes upon property theretofore subject to taxation, which through
 inadvertence it had escaped. It did not operate "retrospectively," in the
 sense of that word, as used in the State Constitution.
- 3. Revenue—Railroad school taxes—Constr. § 13, act of March, 1871.—It was not intended by § 13 of the act of 1871 (Sess. Acts 1871, p. 58) that railroads should pay school taxes in any other districts than those through which it passed, or in which it held property. And the average rate of taxation spoken of in that section, on which to base the railroad tax, was to be made up from those districts, and none other. (Sess. Acts 1875, p. 129.)
- Revenue—Railroad county tax, under set of 1871, suit may be brought in name of county.—For railroad taxes assessed under the act of 1871, (Sess. Acts 1871, p. 56) suit is properly brought in the name of the county.

Error to Livingston Circuit Court.

J. E. Wait, for Plaintiff in Error, contended that for back taxes in default, the only proper mode of determining the tax rate was to take an average of all the sub-districts, and cited Porter vs. Rock Island & St. Louis R. R.. 63 or 64 Ill.

He also contended that the charter of September, 20th 1852 did not have in contemplation school taxes, which were not then in existence, and hence could not have provided against their levy; and that the legislature could undoubtedly establish a tax for the support of schools, which should be neither a State nor a county tax. (Sheehan vs. Good Sam. Hosp., 50 Mo., 155.)

He claimed that § 3 of the act of September, 1852 constituted no vested right in the respondent, such as would preclude the legislature from afterwards providing other modes

of taxation, as was done by the act of March 10th, 1871. On this point he cited City of St. Joseph vs. Han. & St. Jo. R. R., 39 Mo. 477.

James, Carr, for Defendant in Error.

I. The third section of the act is retrospective in its operation, and hence is in violation of the 28th section of the first article of the Constitution of this State. (Dash vs. VanKleek, 7 Johns., 477; Norris vs. Beyea, 13 N. Y., 273; Plum vs. Sawyer, 21 Conn., 351; Whitman vs. Hapgood, 13 Mass., 464; State ex rel. vs. Macon County Court, 41 Mo., 453.)

II. There are twelve congressional townships in the county of Caldwell. The Hannibal and St. Joseph Railroad only runs through four of them—the northern tier of said townships. Each congressional township only composes one district for all purposes connected with the general interests of education in such township. And the "average rate of taxation" referred to in § 13 of the act of March 10th, 1871 is to be computed from those districts alone, not from them together with the eight other townships of Caldwell county. Hence the alleged assessment of school taxes made by the County Court of Caldwell county was, and is, null and void, ander Art. I, § 30 of the State Constitution. (Cool. Const. Lim., 499, et seq.; Wells vs. City of Weston, 22 Mo., 385.)

III. There are three decisions of this court holding that the respondent is not taxable in any other way, or for any other tax than the one specified in the 3d section of the act of September 20th, 1852. (See 30 Mo., 550; 37 Mo., 265; 39 Mo., 476.) Large amounts of the stock of the respondent have been bought and are now held in the faith of these decisions. The Supreme Court of the United States has repeatedly held that when property has been bought and rights acquired on the faith of decisions of the highest court of a State, that property and those rights shall not be impaired by any subsequent decision. (Gelpcke vs. City of Dubuque, 1 Wal. 175; Dodge vs. Woolsey, 18 How., 331; Alleott vs. Supervisors, 16 Wal. 678.)

(Counsel also contended that the act of September 20th, 1852, was a contract between the road and the State, and that even if this were not so, that act was not repealed by the act of March 10th, 1871.—See brief of counsel in State vs. Han. & St. Jo. R. R. Co., ante. p. 143.)

NAPTON, Judge, delivered the opinion of the court.

This cause was decided on a demurrer to the petition, which was sustained. It would subserve no useful purpose to recite the petition or its numerous counts, which occupy twenty closely printed pages of the record.

The object of the petition is to recover the amount of the county tax and school tax, levied on the road under the act of March 11, 1871, the State auditor having assessed the road at \$587,328 between the years 1861 and 1872.

The demurrer asserts that the charter of the road exempts the road from all county taxation; that the act of the General Assembly in 1852 is a contract, and exempts the defendant from taxation except as is specified in the 3rd section of said act, and that the school tax is in violation of the provision of the Constitution of Missouri, which requires all property to be taxed in proportion to its value.

This demurrer was sustained and the case is brought here by appeal.

The only important question presented is whether the Han. & St. Jo. R. R. is exempt from county taxes and from school taxes.

The case of Han. & St. Jo. vs. Shacklett, (30 Mo., 550); State vs. Han. & St. Jo. R. R. (37 Mo., 265); State to use of, etc. vs. Shacklett, (Id., 80) and City of St. Jo. vs. Han. & St. Jo. R. R. Co., (39 Mo., 476.) are referred to as conclusive of the questions presented by the demurrer.

We have no disposition to depart from the points decided in any of these cases. Whether decided properly or not, the corporation now sued had a right to assume that the construction therein given to their charter would be adhered to, and upon the faith of these decisions stock may have been purchased.

It was conceded in all these cases, that the legislature could levy a State tax on this road, after the act of September 20, 1852, which was accepted by the company. The form in which this tax might be ascertained and levied was not deemed material in the case of Bailey, Seligman, &c. vs. Pac. R. R. Co., (U. S. Sup. Ct.). nor was it considered essential by this court in the case of the State vs. Han. & St. Jo. R. R. Co., decided at the present term. And in the case of Han. & St. Jo. R. R. vs. City of St. Joseph, (39 Mo., 476), it was held that a city tax on the railroad was valid, on the ground that municipal taxation for local purposes was not within the exemption from county taxes.

The original exemption of this road from county taxes has never been rescinded by the acts of the parties. The demurrer, therefore, in regard to so much of the petition as related to county taxes, was properly sustained. In regard to school taxes, they may be considered as originating since the charter; and, therefore, nothing was said in it concerning them. Like the municipal taxes of St. Joseph, in 39 Mo., 476, they may be regarded as not within the exemption.

It is, however, arged that the 3rd section of the act of 1871, so far as it has been applied to school taxes, is retrospective, and therefore prohibited by our State Constitution. This section does not undertake to subject to taxation property, which at the date of the ordered assessment was not liable to taxation; but merely to declare that in case property, which has been subject to taxation prior to the passage of the act, has escaped taxation either through the inattention of the owner or of the county officers, these back taxes shall be assessed and collected. It is only applying to railroad property the same system of revenue collections which applies to all other property in the State. It does not operate retrospectively in the sense of this word, as used in the Constitution.

The mode of assessment which seems from the statement in the petition to have been adopted in this case, under the 13th section of the act of March 10th, 1871, is undoubtedly objectionable and not authorized or intended to be authorized by

that section. The statement in the petition is, "that the said County Court at the said meeting thereof, held at the court house in said county, on the 5th day of August, 1872, from the returns in the office of the clerk of said County Court, ascertained the average rate of taxation for school purposes on each \$100 worth of property in said county, as the same had been listed and assessed, levied by the several township school boards, trustees, directors and other proper authorities of the township in said county in which respondent's property was situate, and the said County Court from said returns in said clerk's office ascertained, determined and declared that the average rate of taxation levied for school purposes on each \$100 worth of property, in such townships, districts and subdistricts, for each of the several years on the respective amounts stated in said court."

It is not easy to determine exactly what is meant by this allegation. The phraseology is obscure, and that of the 13th section is perhaps equally so, but we do not suppose it was intended that the road should pay school taxes in any other school districts, except such as it passed through, or in which the company owned property.

A person or corporation owning property in one school district is not taxed to support schools in any other district, although such other district may be in the same county. The legislature had no intention of making railroad companies pay any taxes except such as individual citizens had to pay on the same amount of property.

It is stated by counsel that this county has twelve school districts, and the road passes through only four of the twelve. It was not designed that the road should pay taxes in all the districts of the county, but only in such districts wherein its property was located. This is clear, and if the 13th section was construed to authorize a taxation of the roads in districts where there was no property of the company, the construction was, we think, erroneous. Or, if the average spoken of was determined by the rate of taxation for schools in all the twelve school districts, that would be equally erroneous. The

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average should be determined by reference only to the four districts through which the road passed.

This is made quite apparent in the act of March 24, 1873. The first section of that act expressly declares, what indeed was manifestly intended by the act of 1871, "that railroads shall be subject to taxation for State, county or other municipal or local purposes to the same extent as the property of private persons."

The 12th section of the act of 1873 very clearly provides for the mode of assessing school taxes on railroad corporations, and is in conformity to the construction we have supposed should be given to the act of 1871.

A point has been made, that this suit should have been brought under the act of 1873, in the name of the State; but we think the suit was properly brought in the name of the county. An examination of section 17, of the act of 1873, shows that the remedy therein provided applied only to taxes levied under the provisions of that act; and did not affect the right to sue in the name of the county, for taxes assessed under the act of 1871.

The judgment is reversed and the cause remanded; the other judges concur.

THE COUNTY OF CALDWELL at the relation of THE COUNTY COURT OF SAID COUNTY, Appellant, vs. THE HANNIBAL & St. JOSEPH RAILROAD COMPANY, Respondent.

1. Livingston County vs. Hann. & St. Joe. R. R., ante p. 516, affirmed.

Appeal from Caldwell Circuit Court.

Crosby Johnson & M. A. Low, for Appellant.

James Carr, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

This case involves precisely the same questions involved in the case of Livingston County vs. The Hann. & St. Joe. R. R. Co., decided at the present term; and the same disposition will be made of the case.

Judgment reversed and case remanded.

ROBERT W. LILLARD, et al., Respondents, vs. DAVID E. SHAN-NON, et al., Appellants.

- Execution—Nodaway county—Act of Feb. 1863, as to.—The act of February 15, 1863, in relation to Nodaway and other counties, kept an execution, issued in one of those counties, alive after the return day.
- Execution levied on land not vitiated by prior levy on personalty.—The levy of an execution on personal property does not invalidate its subsequent levy on land.
- Judgment in one county lien on land in another, when.—A judgment rendered
 in one county becomes a lien on land in another only from the date of its receipt by the sheriff of the latter county. (R. C. 1855, pp. 741-2, § 21.)
- 4. Land, fraudulent purchase of—Title placed in innocent third party—Effect resulting.—Where a fraudulent purchaser of hand, in order to shield himself, puts the title in a third party, having no knowledge of the fraud, in an action to set aside the sale, the plea that the grantee was an innocent purchaser without notice will not avail.

Appeal from Buchanan Circuit Court.

Willard P. Hall, for Appellants.

I. The execution of December, 1862, issued from the Nodaway court came to the sheriff of Andrew county the same month, and became a lien on the land in suit from that time; and as Mrs. Montgomery did not purchase till February, 1863, she took subject to that execution. (R. C. 1855, pp. 741-2; § 21.)

II. The levy of the execution on personal property did not satisfy it. The property was returned to and sold by defendant. (10 Mo., 721; 11 Mo., 537; 26 Mo., 308.)

III. Defendants were innocent purchasers for value, without notice. Hence a court of equity will not interfere. (Hamilton vs. McClelland, 45 Mo., 425; 2 Lead. Cas. in Eq., pp. 38, 81.)

B. R. Vinyard, with A. H. Vories, for Respondents.

I. If sufficient personal property is levied upon to satisfy an execution on a judgment, such levy is a satisfaction of the judgment. (Blair vs. Caldwell, 3 Mo., 353; Boone County vs. Lowry, 9 Mo., 24; Bernard vs. Littlejohn, 4 Ohio, 223; Reynold vs. Rogers, Adm'r, 5 Ohio, 169; Smith vs. Hughes,

24 Ill., 270.) The judgment in law was thereby satisfied, unless the property or the bond taken proved ineffectual at the time such proposed sale was to take place. The levy, therefore, on the land, on the 22d day of August, 1863, was without authority, and the sale of the same on the 8th day of October following, passed no title to the defendants. (Durette vs. Briggs, 47 Mo., 356; Weston vs. Clark, 37 Mo., 568.)

II. The execution, under which the sale of the land took place, was at the time of the levy and sale by the sheriff, functus officio. The act of Feb. 18, 1863 (Acts of 1862-3, p. 154) continuing the life of the execution, was qualified by the act of March 23, 1863 (Acts of 1862-3, p. 20); so that a levy before a return day of the execution was necessary to keep it in force after the return day. (McDonald vs. Gronefeld, 45 Mo., 28; Bank of the State vs. Bray, 37 Mo., 194.)

III. The allegation of fraud charged in the petition is fully sustained by the proof.

Napron, Judge, delivered the opinion of the court.

This suit was commenced in May, 1864, and originally the plaintiff was one Whitley, since dead, and subsequently Mrs. Ann Montgomery, who was the beneficiary in the deed to Whitley, and upon the death of both Whitley and Mrs. Montgomery, Lillard and others, sole heirs of Mrs Montgomery, were made plaintiffs.

The facts in the case appear to be these: On the 14th of February, 1863, one Buford Menifee, then a resident of Andrew County, Mo., and owning in conjunction with William Whitley, a tract of land on which he lived, sold his half of said farm (the whole tract being a few acres under seven hundred) to Mrs. Montgomery, a sister of Whitley, who lived in Kentucky. This purchase was made through Mrs. Montgomery's agent, one Kipinger, and a portion of the purchase money was paid down, and the remainder secured by notes. There seems to be no question on either side, of the good faith of this purchase. Mrs. Montgomery, who was then a married woman, had ample means of her own left to her by

her father, and her husband seems at that time to have been absent from Kentucky, traveling in Canada or some of the Northern States—in fact, as may be conjectured from the date, getting out of the reach of the civil commotion then rife in his State.

The consideration for this sale was \$4,000. On the 16th of February, 1863, a deed was made to Whitley, trustee, who was a brother of Mrs. Montgomery, and was acknowledged on that day by Menifee. Mrs. Menifee was not then, on account of the weather, able to travel to Savannah, and her acknowledgment was not taken till July 17th, 1863, and on the 18th of July, the deed was duly recorded.

On the 6th of May, 1862, one Russell obtained judgment against Menifee for \$667, in Nodaway county. On the 22d of May, 1862, an execution was issued to Andrew county, where Menifee lived, returnable on the third Monday in November, 1862. On the 3rd of October, 1862, this execution was returned unsatisfied. On the 17th of December, 1862, an alias writ issued, which was returnable on May 4th, 1863, and which came to the hands of the sheriff of Andrew county in December, 1862. On the 10th of June, 1863, this writ was levied on personal property of Menifee, amply sufficient to satisfy it, and the property was advertised to be sold on the 23d of June, 1863.

By agreement between plaintiff in the execution, the sheriff, and defendant, Menifee, the sale was postponed till the 17th of October, 1863. This agreement was entered on the execution, and Menifee gave a forthcoming bond, on which Woodcock, Pen, Gilman, &c., were securities.

There is abundant evidence that the personal property was amply sufficient to satisfy the execution. It is so averred in the petition, and the proof clearly establishes the fact.

On the 22d of August, 1863, as appears by the return and the deed made in conformity with the sale, the sheriff levied this execution upon the land in controversy, that is upon Menifee's half interest in the seven hundred acres upon which the farm was. Upon the 12th of September, 1863, the

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sheriff advertised the land to be sold on the 8th of October, 1863. This day fixed for the sale, it will be observed, was nine days before the personal property already levied on, was, by the forthcoming bond, to be delivered. The sale of the land took place on the day advertised, and was bid on by John McLain, in the name of the defendants, one of whom is his son, and the other a near relation. John McLain paid the money bid, which was about \$400. The deed of the sheriff was made to defendants.

The allegations of the petition, which seeks to set aside the sheriff's deed, are that John McLain and the defendants knew of this previous levy on personal property of Menifee, and charges that these transactions were fraudulent; that there was a conspiracy between the sheriff and Menifee and John McLain, to defraud Ann Montgomery out of her property; that they all knew of her title, and that the land was sacrificed.

The petition charges that defendants took possession under the deed of the sheriff; that plaintiff never lived here, had no knowledge of the lien or judgment of Russell, or of any judgment against Menifee.

The petition further charges that the rents and profits of said land are worth \$1,200 per year, and charges a confederation between Russell, Menifee, Woodcock, McLain, &c., whose object was to divert the personal property of Menifee to pay debts due Woodcock & McLain. It charges that they paid the amount due on the execution over and above the \$400 bid on the land, and charges notice of the deed to Mrs. Montgomery.

The answer in this case need not be specially noted, as it denies every allegation in the petition, and sets up affirmatively that the defendants have made improvements and paid taxes amounting to \$5,000.

The court decreed that the sheriff's deed be set aside, and declared null; that plaintiffs recover the possession of their half interest derived from the deed of Menifee, and that defendants pay \$1,025.40 for the use of the land, after deducting

taxes and improvements made by them, and monthly rents at 16.66 per month, until the plaintiffs are put in possession.

There is no doubt that the levy made by the sheriff in Angust, 1863, was a valid one, and that the act of February 15, 1863, in relation to the courts in certain counties, among which were Nodaway and Andrew, kept this execution in force after the return day. The levy, sale and deed, then, constitute a prima facie title.

Nor can it be maintained that the prior levy on personal property, of itself, destroyed the vitality of the writ. In Moss vs. Craft, (10 Mo., 720) it was held that an execution on a judgment against principal and surety, levied on property of the principal, which for want of bidders was not sold, could still be levied on the property of the surety. In the case of Williams vs. Boyce (11 Mo., 538), it was held, that the levy of an execution on property sufficient to satisfy the execution, and its release and the return of the property to defendant, was no satisfaction of the execution. And in Blackburn vs. Jackson, (26 Mo., 310) a formal levy of an execution upon defendant's property, when the property levied on was returned to him, did not operate as an extinguishment of the judgment.

The statute in force at the date of the execution, (R. C. 1855, pp. 745-6, § 21) provided that "no execution shall be a lien on slaves, goods, chattels or other personal property, or the rights or shares in any stock, or any real estate to which the lien of the judgment order or decree does not extend, or has expired, but from the time such writ shall be delivered to the officers of the proper county."

As the judgment of Russell was obtained in Nodaway county, the lien on the land of defendants only took date from the day the sheriff of Andrew county received it. Apparently at that time, on the deed of the sheriff, the title was in defendants. Had it been otherwise, it would be difficult to see the grounds of this proceeding; for if the levy and sale and deed were all illegal, the plaintiffs could have maintained an ejectment, and would have no occasion to go into a court of equity.

The propriety of the decree, then, depends upon the peculiar facts which, in this case, attended the second levy, and which were such as to satisfy the Circuit Court of an unfair combination on the part of the sheriff and defendant in the execution, and the purchaser, McLain, to transfer an execution against personal property amply sufficient to satisfy it, to a tract of land sold to a non-resident, a woman who could not be there to protect her interests. It appears very clearly that McLain, and perhaps others, were creditors of Menifee, to a small amount, and arranged with the sheriff to let alone this personal property levied on, and for the forthcoming of which ample security had been given. There was no release of the personal property levied on; but it was arranged with a view to enable Menifee to sell the property that the execution should be transferred to the land bought in February by Mrs. Montgomery, and the deed to which was then on record, and of which sale all the parties had actual knowledge; and although the sale of the land brought only \$400, the purchaser paid up the \$300, etc., still due on the execution.

It is simply, then, a question of fraud. The plea of defendants being purchasers without notice is entitled to no consideration. The land was bought by McLain, and the title put in his son and nephew, who, it is likely, knew nothing whatever of the circumstances. They represent him, for all purposes of this action, and the plea of innocent purchasers, without notice, etc, cannot avail. (Meroy vs. Abney, 1 Ch. Ca., 38).

We think the decree was right, and therefore affirm the judgment. The other judges concur, except Judge Vories, who had been of counsel.

Early v. Reed.

PATRICK H. EARLY, Appellant, vs. LAWRENCE REED and THOMAS CALLIGAN, Respondents.

1. Right given by railroad to transfer freight, etc.—Assignment of, when lawful—Repudiation of by railroad.—A contract with a railroad under which one has the right to transfer freight and passengers across a river, may be assigned with the consent of the company, and its assignment is a good consideration for a note. If the company repudiate the assignment, that fact may be set up as a defense to the note; but if the defense be traversed by replication, judgment for defendant, without testimony, is error.

Appeal from Buchanan Circuit Court.

Bennett Pike with L. E. Carter, for Appellant, contended, among other points urged, that the contract assigned was not founded merely on personal trust and confidence; and that the case of Lansden vs. McCarthy, (45 Mo., 106) was not applicable; and also that the assignment was accepted by the company, and that defendant went forward and did the work authorized under it.

W. H. Sherman, for Respondents.

I. The position of Early under the contract imposed upon him, when required to perform them, duties of great trust and reponsibility. It is a personal contract, and was not assignable. (Lansden vs. McCarthy, 45 Mo., 106; Leahey vs. Dugdale, 27 Mo., 439; Robson vs. Drummond, 2 B. & Ad., 303; Flint & C. R. R. Co. vs. Dewey, 14 Mich., 477.) See also opinion of Lord Abinger, who discusses this principle in Gibson vs. Carruthers, 8 M. & Welsby, 343; 2 Chit. Contr., [11 Am. Ed.] p. 1363.

The contract is not made with Early "and his assigns." II. The contract is void for want of mutuality. The railroad does not contract to furnish Early with employment, or to require his services. He has merely a possibility of employment. (I Chit. Contr., 11 Am. ed., 20 et seq.; Tucker vs. Woods, 12 Johns. 190; 3 Seld., 349; Erwin vs. Gordon, 49 N. H., 444, 457; 1 Chit. Pl., 297.) Such a possibility is not the subject of an assignment. (Mulhall vs. Quinn, 1 Gray, 105.)

Early v. Reed.

WAGNER, Judge, delivered the opinion of the court.

The only question in this case is, whether the court decided rightly in giving judgment in favor of the defendant on the pleadings.

The action was brought on two promissory notes, and the answer pleaded a failure of consideration, and alleged that they were given on account of the assignment of a contract that plaintiff had with the St. Joseph and Denver City Railroad Company, by which the company agreed to give plaintiff the right to transfer freight and passengers from St. Joseph across the Missouri river to Elwood, and from the latter place back to the former; for which it was agreed that plaintiff, or his assigns, should receive certain specified rates; that the company refused to recognize defendant, or permit him to have anything to do with the business, and so the consideration for which the notes were given entirely failed.

To this answer a replication was filed, in which it was denied that the consideration failed, or that the company refused to recognize defendant, or allow him to proceed under the contract.

Upon this state of the pleadings, the court, without hearing any evidence, on motion, rendered judgment for defendant.

The answer stated a good defense, but after the denials in the replication, its averments should have been proved by evidence. The contract was certainly assignable with the consent of the railroad company, and whether the company agreed to or repudiated the assignment was the only important issue in the case, and that could only be determined by introducing testimony.

Wherefore the judgment must be reversed and the cause remanded; the other judges concur.

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Pomeroy v. Allen, et al.

ROBERT E. POMEROY, by next friend, etc., Respondent, vs. Rufus K. Allen, et al., Appellants.

 Partition—Sale of land in partition—Confirmation of discretionary with lower court.—The confirmation or rejection of a sale of land in partition, is a matter resting largely in the discretion of the lower court, and the Supreme Court will be very slow to interfere with its action.

Appeal from Buchanan Circuit Court.

Hill & Carter, for Appellants.

Ben. Loan, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This case comes here for review upon an appeal from a judgment of the court below, setting aside the sale of a piece of land made to the defendant by the sheriff in partition.

In accordance with a decree in partition, the sheriff exposed the land for sale, and the defendant bid in the same for the sum of four hundred and five dollars. The parties to the partition suit, who were all minors but one, filed their motion to set aside the sale, because the price was inadequate, and on account of certain irregularities alleged to have taken place. After hearing evidence, the court sustained the motion.

The sale seems to have been conducted with fairness, and there was no ground for interference in that regard. There was no such inadequacy of price as would have justified a court in setting the sale aside under ordinary execution process. The defendant's bid was four hundred and five dollars, and the testimony of most of the witnesses was that the property was worth from six hundred to one thousand dollars.

But sales in partition do not stand on the same footing as sales made by the sheriff on execution. In partition sales the sheriff must report his proceeding to the court, and until there is an approval or confirmation of the same, no deed can be executed. The approval rests mainly in the sound discretion of the court; and the sustaining of the motion in this case was equivalent to a refusal to approve or confirm the report.

Bank of Kentucky, et al. v. Poyntz, et als.

As the parties were nearly all infants, whom the courts always endeavor to protect, and as it is evident that the property is worth more than it sold for, we cannot say that the court exercised its discretion unsoundly.

The judgment is affirmed; the other judges concur.

THE BANK OF KENTUCKY, et al., Defendants in Error, vs. John B. Poyntz, et als., Plaintiffs in Error.

1. Equity suit to remove trustees and set aside sale made by them of land—Decree ordering payment of balance of purchase money—Vendor's lien.—The creditors of an insolvent debtor brought suit in this State to set aside the sale of his Missouri lands, made by his trustees, and to remove the trustees, charging unfitness and unfaithfulness on his part, and fraud in the sale. The court ordered their removal and the appointment of the county sheriff in their stead, but confirmed the sale. Prior to this proceeding, the creditors had sued the trustees in Kentucky, where all the parties resided, but the action was undetermined. Held, that although the Missouri Court might order their removal, so far as their trusteeship here was concerned, it could not, in the above state of case, while this suit in Kentucky was pending, and without any issue authorizing such a decree, direct the purchaser to pay over the unpaid purchase money to the sheriff. If an enforcement of the vendor's lien were needed, in consequence of the inability of the purchaser to pay the amount of the notes, suit might be brought in this State, but must be instituted on the notes.

Error to Carroll Circuit Court.

Hale & Eads, for Plaintiffs in Error.

I. The balance due from Dawson and his notes to the trustees, are tied up by the Kentucky suit, which was brought prior to and not divested of the jurisdiction by the present one. The decree of the court below compels defendant to pay the money, and leaves his notes outstanding, on which he may be again sued.

II. The court finds there was a lien for the unpaid purchase money retained by the terms of the deed, and the trust estate cannot lose the lien. Hence, the court should not go outside of the issues involved in this suit, and order this payment.

Bank of Kentucky, et al. v. Poyntz, et als.

III. The court might have restrained defendant from paying this balance to the old trustees, but could do no more.

IV. If the court found that the defendant was a fraudulent grantee, and that the title to the property could not be reached, then the court might take control of any balance unpaid, and hold it for the creditors. But in this case the court expressly found that the sale was fair, and that the balance due is well secured by a lien.

Ray & Ray, for Defendants in Error.

I. A judgment in a foreign country touching lands will be held of no validity, while a judgment of the "forum rei site" is held absolutely conclusive. (Sto. Confl. of Laws, 735, § 591, 7th ed.)

II. Under the general prayer for relief, the court may grant such relief as is warranted by the allegation and the proofs, and as may be just and equitable. (Holmes vs. Fresh, 9 Mo., 201; Holland vs. Anderson, 38 Mo., 55; McGlothlin vs. Hemery, 44 Mo., 350; Keeton vs. Srpadling, 13 Mo., 322; 1 Sto. Eq., 468, § 439, 4th ed.; McNair vs. Biddle, 8 Mo., 257.) The fact that upon the trial of the issue, between plaintiff and defendant Dawson, in reference to the validity of said sale, the issue was found for said defendant, does not make it inequitable, or preclude the court from securing to the beneficiaries, by appropriate order, the balance of the proceeds.

Napron, Judge, delivered the opinion of the court.

The only question in this case is as to the propriety of the final decree of the Circuit Court. There is no controversy about the facts and the evidence at the hearing is not therefore preserved in the record.

All the parties, plaintiffs and defendants, are non-residents. About the year 1855, a mercantile house in Kentucky failed in business, and were debtors in a large sum to the plaintiffs and other creditors, and made a deed of trust of all their property, consisting of lands in Missouri, Alabama, Mississippi and other States to two of the defendants named Poyntz,

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for the benefit of their creditors, giving said trustees power to sell said lands and apply the proceeds in a mode directed by the deed. About three thousand acres of this land were in Carroll County, Missouri, and the trustees sold and conveyed to Dawson, one of the defendants, about two thousand acres of this land in Carroll County for \$10,000, one-half of the purchase money being paid at the date of the sale, and Dawson's notes, payable in one and two years, taken for the remainder.

The object of this petition in the Circuit Court of Carroll County was, to secure these lands in Carroll County that were unsold, to the creditors, and to set aside the sale and deed to Dawson, upon allegations of the general unfitness and unfaithfulness of the trustees.

The trustees were made parties defendant, and served by publication, and an interlocutory decree was made against them, which, however, they subsequently moved to set aside. And this interlocutory decree was set aside, and they were allowed to answer at a time fixed by the court; but there was no answer on their part and the decree was ultimately made final as to them.

Dawson, who had purchased a portion of these lands, filed his answer, denying all the allegations of the bill, so far as they affected his purchase, and the court found in his favor, on the testimony (not reported.) and confirmed his title; but the court in its final decree, displaced the trustees, as had already been done in the interlocutory decree, and ordered Dawson to pay over to the sheriff the balance of the purchase money, and, if he failed to do so at a day specified in the decree, directed the sheriff to sell Dawson's lands and retain the purchase money, subject to the further orders of the court.

It appears from the pleadings—which is all that is before this court—that a proceeding was pending in Kentucky to remove these trustees, and it was averred in the answer of Dawson that his notes had been garnished in this proceeding. This allegation of garnishment was denied in the replication, but there is no finding of the court on this issue. It is not material,

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however, in the view we take of the case, whether such garnishment was made by the plaintiffs in the suit in Kentucky or not.

The court proceeded, in its decree, to enforce a vendor's lien for unpaid purchase money not ascertained by any judgment. The petition asserted that the sale was fraudulent and void, and asked that it be set aside; and the issue on this point was found for defendant Dawson, the purchaser.

It was determined that the sale to Dawson was a valid one. There was nothing in the pleadings to require an investigation into the amount of money due by Dawson at the date of the decree. The notes given were conceded to be in Kentucky, where all the parties lived, and no proceeding on them had ever been instituted in this State. The courts of this State were open to the holders of the notes, and the notes were a lien on the land bought by the maker of them. But the allegations in the petition and the denials in the answer made no issue in regard to these notes. No judgment on them was asked, for the petition alleges them to be fraudulent. Whether they had been garnished in the Kentucky suit, or in whose hands the notes were, does not appear; nor whether any portion of them had been paid.

We are unable to perceive any ground for that portion of the decree which orders Dawson to pay over the money called for by the notes he gave to the trustees, and, on his failure to do so, directing the sheriff to sell Dawson's lands.

The notes were given to the trustees who reside in Kentucky, and who have not been removed from their trust by the court in Kentucky, so far as it appears, and who are subject to the final orders of that court. The court here sanctions the sale made to Dawson, and pronounces it to have been in good faith and valid. That being the case, the creditors who also live in Kentucky and who had, previously to the proceeding here, instituted proceedings there to save themselves, so far as the court of that State could do so, have not asked for any such decree here, nor made any allegation in their petition upon which such a decree could be based. On

the contrary, their petition contains charges totally inconsistent with such an application for such relief; and in truth there was no need of applying here for such relief, as the jurisdiction of the court in Kentucky was ample over the persons and property referred to, to-wit, over Dawson and the notes in the hands of the trustees. True, if an enforcement of the vendor's lien was needed, in consequence of the inability of Dawson or his securities on the notes to pay the amount due, the court in this State must be resorted to. The suit must then be on the notes and payments, and other defences might be made, to which the present proceeding is totally foreign.

The removal of the trustees here, by reason of their default, of course only affects their position as it regards the lands here. They might be allowed to retain their trusteeship by the court in Kentucky, or others in that State may replace them to whom the notes in question will be handed over.

As the Kentucky trustees were removed, so far as the lands here are concerned, and the sheriff substituted in their stead, that part of the decree which directed the sheriff to dispose of the unsold lands and retain the proceeds, subject to the order of the court, was upobjectionable.

The case will be remanded for the Circuit Court to modify the decree in conformity to this opinion.

Judgment reversed and case remanded. The other judges concur, except Judge Sherwood, who is absent.

ROBERT STOCKTON, Ex'r, etc., Respondent, vs. Daniel Ransom, Adm'r, et al., Appellants.

1. Probate Court—Settlement made in vacation—Assent thereto by executor before appointment—Confirmation in term time of settlement—Injunction to prevent execution sale under—Motion to quash execution.—The assent of one subsequently an executor, before probate of the will and before his appointment, to a settlement of the testator's estate, and a judgment of the Probate Court, rendered in vacation, ratifying such settlement, are both void; and a subsequent order in term time merely confirming the supposed judgment, is not itself a

judgment and cannot impart validity to the prior proceedings. But in such a case, without allegation of fraud or accident, or danger of irreparable damage or cloud on title by sale of realty, equity will not interfere, by injunction, to prevent an execution sale under such confirmation. A party interested has his remedy at law by motion to quash the execution.

Appeal from Ray Circuit Court.

J. W. & J. D. Strong, for Appellants.

A. H. Vories, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

This was an application for an injunction to prevent a sale of personal property under execution.

The facts in the case are not controverted and appear to have been these: Wm. Stone was administrator of one Moore, and having himself died in 1870, Ransom, the defendant, was appointed administrator de bonis non, of Moore's estate. Stockton, the plaintiff, was named as executor in Stone's will, which was probated on the 13th of May, 1870, and on the same day, Stockton was appointed by the court, as administrator with the will annexed and qualified by giving bond, etc.

Upon the records of the Probate Court, there appears the following entry, made April 30th, 1870, when the court was not in session, and before said Stockton had been appointed administrator by the court, and before the will of Stone had

been probated.

"David Ransom, adm'r de bonis non of estate of Wm. Moore, deceased, against Robert Stockton, executor of Wm. Stone, deceased. Now, on this day, this cause comes on for trial, said Stockton defendant, being present, and after hearing all the evidence on the part of both plaintiff and defendant, and after reviewing the inventory, and sale bill and all the settlements of said Wm. Stone, former administrator of said Wm. Moore, made during said Wm. Stone's lifetime, and the court, after hearing the evidence and reviewing the papers and documents aforesaid, it is found there was error and mistakes committed by said Wm. Stone in his Stone's favor, as follows, to-wit:" (here follow various items) "together with other and

sundry errors made and committed by said Stone and in his favor, all amounting to the sum of \$2,000; and it is agreed by said Stockton as executor, as aforesaid, and said Ransom, administrator as aforesaid, that there shall be a complete and full settlement of all and singular the differences of said Moore's and Stone's estates aforesaid. It is therefore ordered, adjudged and decreed by the court, that Daniel Ransom, adm'r of Wm. Moore, deceased, de bonis non, have judgment against Robert Stockton, ex'r of the estate of Wm. Stone, deceased, in the said sum of \$2,000, and that he have execution therefor, and for his costs laid out and expended on this behalf, and the court further orders the said Daniel Ransom, adm'r as aforesaid, to proceed to inventory said sum of \$2,000 as a judgment against himself as said adm'r of Wm. Moore, etc.; and it is hereby agreed between said Robert Stockton, ex'r of estate of Wm. Stone, and Daniel Ransom, adm'r, de bonis non of estate of Wm. Moore, dec'd, that the within and foregoing order and judgment shall now be filed and spread of record when the said Stockton shall have made probate of the last will and testament of said Win. Stone, dec'd. Witness our hands this 30th day of April, 1870.

ROBERT STOCKTON,

DANIEL RANSOM,

Adm'r de bonis non.

Attest LEWIS H. WEATHERBY.

Judge of Probate of DeKalb County.

Then follows on the record, the following, dated June 13, 1870: "Now on this day in term time, court confirms the judgment had in vacation (April 30th, 1870) against the estate of Wm. Stone, deceased, in the sum of \$2,000, the will of said Wm. Stone, dec'd, having since been admitted to probate."

Upon this judgment, or supposed judgment, Stockton paid \$1,196.67, and on the 31st of Oct., 1873, the probate judge issued an execution for the remainder due, of \$940, in favor of Ransom, adm'r. against the plaintiff, Stockton, which recited that on the 13th of June, 1870, Ransom had recovered a judgment against the plaintiff in said Probate Court for the

sum of \$940, which the court had ordered plaintiff to pay over to Ransom, that he had refused to pay the same, and therefore the sheriff was ordered to make the sale of the goods and chattels of said Stockton.

Under this writ the sheriff levied on certain notes, the property of Stone, in the hands of Stockton, the executor, amounting \$1,000, and took the same from Stockton's possession.

An injunction was asked to prevent the sheriff from selling this property. The usual averments were made in the petition, that the plaintiff was without remedy at law, and that irreparable damage would be sustained by plaintiff unless the sheriff was restrained from selling these notes.

A temporary injunction was granted, and after the answer and replication were filed and the evidence heard, the court made the injunction perpetual.

It is apparent from the record of the Probate Court, that the supposed judgments in this case were mere nullities. The assent of Stockton to a settlement, before the will of his testator was proved and before his appointment, was of no validity; and the judgment of the Probate Court in vacation was equally void. The subsequent entry in term time contained none of the essential requisites of a judgment, but was simply a confirmation of a supposed judgment, which had no existence. The execution, therefore, had no judgment to support it.

The only question, therefore, is whether this was a case upon the facts stated, to authorize the interposition of a court of equity, upon the general allegation that the plaintiff was without adequate remedy at law. The execution was levied on personal property, upon which no pretium affectionis existed, no real estate was levied on, the sale of which might obscure the title, and no facts were stated in the petition to show that any irreparable damage could ensue, or that any damage could result that could not be readily compensated. No reason is perceived why an application to the Probate Court to quash the execution should not have been made and

none is alleged. No fraud or accident is alleged to call for the interposition of a court of equity.

It is averred in the petition that the judgments or judgment on which the execution issued were void, and this allegation is sustained; but will a court of equity enjoin proceedings under an execution on a void judgment, without the allegation and proof of some fraud or accident which prevented the party from moving in the law court? The plaintiff in this case had only to apply to the Probate Court to have the execution quashed, which had no judgment to support it; and, if the Probate Court refused an appeal to the Circuit Court, enabled him to get the opinion of another court.

The remedy at law was adequate so far as the facts appear. It was only necessary to apply to the Probate Court, from which the execution issued to have it quashed. No judgment of that court authorized the execution. There was no judgment in fact entered, so far as the records show. A mere confirmation of an agreed judgment in vacation without a formal judgment, did not amount to a judgment.

There is nothing averred in the petition, nor proved upon the trial, to show that the Probate Court could not arrest this execution, illegal as it was. Why then ask the interposition of a court of equity?

Judge Story says (Sto. Eq. Jur., § 887) "after a judgment at law, any facts, which prove it to be against conscience to execute such judgment, and of which the injured party could not have availed himself in a court of law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will, in general, authorize a court of equity to interfere by injunction, to restrain the adverse party from availing himself of such judgment. (See also Adams Eq., 391 where the same doctrine is asserted and authorities cited.)

But here, in the first place, there was no judgment to set aside; and had there been an irregular judgment, nothing is averred to show that the execution could not have been arrested or quashed in the court where the supposed judgment was entered.

The judgment must be reversed. The other judges concur.

STATE OF MISSOURI. ex rel., WILLIAM S. BRACKEN, ETC., Appellant, vs. Joseph F. Heiser, etc., Respondent.

1. Schools—Sub-districts—Organization of towns with adjacent territory—Const. Stat.—Territory embraced in a school sub-district outside of, and adjoining an incorporated town, may be organized with it for school purposes under Art II, \$\frac{3}{4} \cdot 1 \text{ tseq.}, of the school law. (Wagn. Stat., 1262.) In such case a previous "mutual agreement" of the municipal and township boards, etc. as provided by \$\frac{3}{4} \cdot 17, Id., p. 1267, is unnecessary. If, after the town sub-district is organized under the law, and Boards of Directors and of Education are duly elected and qualified, it becomes desirable to have additional territory from the township annexed for school purposes, it must be added in accordance with the provisions of \$\frac{3}{4} \cdot 17.

Appeal from Caldwell Circuit Court.

H. J. Chapman, for Appellant.

J. M. Hoskinson, for Respondent.

Vories, Judge, delivered the opinion of the court.

This was an information in the nature of a quo warranto, filed on the relation of William S. Bracken, who represents himself to be the President of the Board of Education for township 56, in range 28, in Caldwell County.

The petition states substantially, that in the year 1868, township fifty-six, in range twenty-eight, in Caldwell County constituted one school district under the laws of this State; that in the month of October, 1868, the Board of Education of said district sub-divided said township or district into seven sub-districts, which said sub-districts were numbered from one to seven inclusive; that said sub-district numbered two, so created, included within its limits, the town of Kingston, with her corporate limits defined by law, as well as other territory adjoining thereto; that a plat defining the limits of the several sub-districts into which said township had been thus divided, had been duly filed, etc.; that local directors had been duly elected for each of said several sub-districts, and that a clerk had been elected for each of said several boards of directors; that in said sub-district numbered two, which includes the town of Kingston, William S. Bracken, (the relator,) John Mc-

Naughton and Nelson A. Smith were elected as local directors; and that said Wm. S. Bracken was elected clerk of said local board of directors; that the clerks of the several boards of directors of the said several sub-districts constituted the board of education for said township numbered fifty-six, and that they, as such board, in April, duly elected the said William S. Bracken (the relator,) president of said township board, etc.; and that he was duly qualified and installed into said office; and that said board of education so constituted were entitled to all the rights and privileges of boards of education as secured by the laws of this State.

The petition then charges, that on, or about the 17th day of January, 1873, an election was held in said town of Kingston, for the purpose of adopting the school incorporation law in relation to towns, cities and villages, as is shown in Wagn. Stat., pages 1262 and following; that at said election (said town of Kingston being situated in the territorial limits of said sub-district numbered two) all of the voters in said subdistrict numbered two were permitted to vote for the adoption or rejection of said law, and a majority of votes so cast at said election were in favor of the adoption of said law; that by virtue of said election it is claimed by defendant that the whole of the territorial limits of said sub-district No. 2 became incorporated under said law, authorizing cities, towns, etc., to organize for school purposes into independent school districts: that an election was afterwards held for the purpose of electing directors to serve as a board of education of the said "Kingston School District" so created as aforesaid; at which election George Royer, Samuel Turner and others were elected and claimed to be, and constitute a "Board of Education of Kingston School District" and that the defendant, Joseph F. Heiser was elected president of said board; and that by virtue of these elections and proceedings, the defendant claims to be president of said board of directors, and that said assumed board of directors assume to act for and to control all of the school property belonging to said sub-district number two; and that they are usurping the powers and duties of school directors in and for the same.

The petition has many more and different allegations in reference to what is considered the illegal acts of the defendant, and said board of directors, charging that they are about to issue bonds for the purpose of the erection of a school house, and that said pretended board is threatening to levy taxes, etc., etc.

Injunctions are prayed for, and a judgment of ouster asked against defendants together with other things, which it would be a waste of time to mention; as the merits of the case depend on the portions of the petition hereinbefore substantially stated.

This petition was demurred to, and the only ground of demurrer necessary to notice, is, that the petition does not state facts sufficient to constitute a cause of action.

The demurrer was sustained by the court, and the plaintiff refusing further to plead, judgment was rendered against the relator from which he appealed to this court.

There are several points raised in this court in reference to the action of the court below in permitting the filing of a substituted demurrer after the demurrer filed in the case had been overruled and in reference to the action of the court in deciding the cases after the substituted demurrer had been filed without hearing a re-argument of the case, which are all deemed to be purely technical and without merit, and will not be further noticed in the opinion in the case. The only real question to be decided by this court is, does the petition in this case state facts sufficient to constitute a cause of action against the defendant.

It does not seem to be questioned by the petition, that the town of Kingston is a town of the description, which is authorized by Art. II. of chap. 123 to organize into a single and separate school district for school purposes. (2 Wagn. Stat., 1262, §§ 1, et seq.)

It is admitted by the petition, that the inhabitants of subdistrict number two, in township fifty-six, which includes the town of Kingston, attempted to organize under said act; but it is insisted that in doing so they had no right to organize

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any portion of the territory of said sub-district, except that included in the corporate limits of said town; and that no person had a right to vote at the election held for the adoption of said law, except such as resided in the corporate limits of the town. And it is further insisted, that in order to the organization of any adjoining territory with said town, it must be done under the seventeenth section of said article; that in this case all of the inhabitants in sub-district number two voted in the elections held for the purpose of the adoption of said law and the organization of the district under the same; that the whole proceedings are, therefore, void, and that the defendant is a mere usurper of a supposed office.

The first section of the act under which the town of Kingston and attached territory attempted to organize is as follows:

Section 1st. "Any city, town or village, the plat of which has previously been duly filed and recorded in the recorder's office of the county wherein the same is situated, together with the territory attached, or which shall hereafter be attached to any such city, town or village for school purposes may be organized into and established as a single school district in the manner and with the powers hereinafter specified; but the provisions of this act, except section fifteen shall not apply to any city, town or village, or any part thereof, which is now or may hereafter be governed as to schools, by any special law."

The second section provides that "in order to form such organization, written notices shall be posted up in three or more public places in said contemplated district, signed by at least twelve resident freeholders of the same, requesting the qualified electors in said district to assemble, upon a day, and at some suitable place in said district, then and there to vote by ballot for, or against the adoption of this act, which notice shall be posted up at least ten days next prior to said meeting."

The third section provides for the manner of conducting the election after the voters have assembled.

The fourth section provides for manner of electing directors for the new district if the law should have been adopted at the previous election.

The fifth section provides for the election of a president and treasurer of the board of directors and prescribes their duties, etc.

The seventeenth section provides that "adjoining territory may be annexed to any city, town or village for school purposes by the mutual agreement of the respective boards of education of such city, town or village, and of the township interested; either board may propose such annexation of territory by resolution, and notify the other board interested, who shall act upon the same without delay, and when they shall return to the board making the proposal their approval, the territory shall be deemed annexed, provided, that no territory shall be deemed annexed until the assent of a majority of the voters of the territory to be annexed, shall be given at an election to be held for that purpose." *

Now it is insisted by the relator that no territory outside of the corporate limits of a town can be organized with said town under this law, without a compliance with the provisions of the seventeenth section, and that as a large amount of territory which had previously been and constituted a part of sub-district number two, including the town of Kingston, and attached therewith for school purposes, was organized with said town under the first, second, third and fourth sections of said act, the whole proceeding was thereby void and the officers attempted to be created therein were usurpers.

I do not think that this is a proper construction of the statute. The first section provides that any town, etc., together with the territory attached, or which shall hereafter be attached for school purposes, may be organized into and established as a single school district, etc.

In this case all of the territory included in sub-district number two embracing the town of Kingston, was attached together for school purposes; and it was necessary and proper when an attempt should be made to organize the town of Kingston under this law, that the whole district of country thereto attached for school purposes, should be included; and it was right and proper that all of the qualified voters residState, ex rel. Bracken v. Royer, et als.

ing in said attached territory should vote and participate in such organization, which seems to have been done in this case. If, after the separate school district is organized under the law, and a board of directors and a board of education duly elected and qualified, it becomes desirable to have additional territory from other portions of the township annexed for school purposes, it must be annexed under the provisions of the seventeenth section. (State vs. Nesbitt, 53 Mo., 127.)

We see no error in the rulings or judgment of the Circuit Court. The costs were properly recovered against the relator. The judgment will be affirmed; the other judges concur.

THE STATE OF MISSOURI at the relation of WILLIAM S. BRACKEN, et als., Appellants, vs. George Royer, et als., Respondents.

1. State ez rel. Bracken vs. Heiser, ante p. 540, affirmed.

Appeal from Caldwell Circuit Court.

H. J. Chapman, for Appellants.

J. M. Hoskinson, for Respondents.

Vories, Judge, delivered the opinion of the court.

This case is identical in principle in every material particular with the case of the State of Missouri on the relation of William S. Bracken, president, vs. Joseph F. Heiser, president, etc., decided at the present term and for the reasons given in the opinion in that case, the judgment in this case is affirmed. The other judges concur.

35-vol. Lx.

John W. Woods, Guardian, etc., Appellant, vs. Benj. F. Boors, et al., Respondents.

1. Guardian and curator—Authority given to by Probate Court of Andrew county to invest funds of ward in real estate—Authority dehors the statute.—Under the act of March 19th, 1866, (Adj. Sess. Acts 1866, p. 83) the Probate Court of Andrew county cannot confer upon a guardian authority to invest the money of his wards in real estate, unless the fund be itself proceeds derived from the sale or lease of their lands. And the guardian has no such power independent of the statute. Such purchase with a trust fund not so arising is absolutely void.

Appeal from Andrew Circuit Court.

Heren & Altgeld, for Appellant.

As the money of these wards was not derived under the provisions of this statute, from a sale of their land, but from another source, the Probate Court had no power to order their guardian to purchase real estate without this fund. (Shoul. Dom. Rel., 413; Sears vs. Derry, 26 Conn., 273.)

W. S. Greenlee, for Respondents.

I. If the court may order the proceeds of real estate sold by the guardian to be re-invested in real estate, it can order the proceeds of land sold by the administrator, or funds derived from such sale through the hands of the administrator, or even the proceeds of personal estate to be so invested. And it would also have that power by virtue of its authority to make appropriations of the estate for the proper education and support of the wards.

II. The party seeking to set aside the settlement and allowance in favor of his guardian, must charge and prove that such allowances and settlements were procured by fraudulent and false means and pretences, unjustly and to the injury of the parties and estate interested. (20 Mo., 87; 27 Mo., 399: 34 Mo., 253; 47 Mo., 390; 54 Mo., 200.)

WAGNER, Judge, delivered the opinion of the court.

This was an equitable proceeding to vacate and set aside a deed and correct a settlement made by the defendant, Boots,

whilst acting as the guardian and curator of the minor plaintiffs.

The facts are, that Boots was the guardian and curator of the minor heirs of one Patterson, deceased, and whilst acting as such he received the sum of twenty-six hundred dollars, belonging to his wards. By an order of the Probate Court of Andrew county, he was authorized to invest the money in real estate, for the benefit of his wards, and in pursuance of that authority he purchased of one Burns, who is defendant in this case, and who was a surety on his bond, an eighty acre tract of land, for the price and sum of twenty-eight hundred dollars. He paid all the purchase money except eight hundred dollars, and the deed made to the infants expressly reserved a lien in favor of Burns, the vendor, for the unpaid purchase money, which was to bear ten per cent. interest till The wards had no other estate whatever, except the twenty-six hundred dollars which came into the guardian's The Probate Court approved this proceeding, and the guardian afterwards made his final settlement, and was

Subsequently the plaintiff was appointed guardian and curator, and instituted this proceeding. The bill charges fraud, and a combination between Boots and Burns to cheat the minor children out of their patrimony; and alleges that the consideration agreed to be paid for the land was greatly in excess of its true value.

The court found for the defendants.

It is now insisted that the act of the defendant Boots, in making the purchase, was void, and that the Probate Court had no jurisdiction of the matter, and could confer upon him no authority.

The power of ordering a guardian or curator to sell lands of the wards and invest the funds, existed originally in the Circuit Court as a court of chancery. By the act of 1866, (Sess. Acts 1866, p. 84) the Probate Court in certain counties was invested with the same power to a certain extent, and this act was afterwards applied to Andrew county. By sec-

tion 7 of the act, it is provided that "said Probate Court shall have concurrent jurisdiction with the Circuit Court in the following cases: when the income of a ward shall be insufficient to maintain him or her and their families, or when it appears that it would be for the benefit of a ward that his or her real estate, or any part thereof, be sold or leased, and the proceeds put on interest or invested in some productive stock or real estate, his guardian or curator may sell or lease the same accordingly, upon obtaining an order for such sale or lease from said Probate Court of any real estate owned by said ward in any county in the State; provided said Probate Court shall have the control of the estate of said ward; such guardian or curator shall proceed as hereinafter directed."

Section 8. "To obtain such order the guardian or curator shall present to such Probate Court a petition setting forth the condition of the estate and the facts and circumstances on which the petition is founded. If after a full examination, on the oath of a creditable and disinterested witness, it appears either that it is necessary, or that it would be for the advantage or benefit of the ward, that the real estate, or any part thereof, should be sold or leased, the court may make an order therefor, specifying therein whether the sale or leasing is to be made for the maintenance or education of the ward and his or her family, or that the proceeds may be put out on interest or invested on the circumstances which render such disposition beneficial."

Unless the statute gave the power for the action of the guardian in this instance, it did not exist. The Probate court had no original jurisdiction; and the established principle is, that where a statute confers on such a tribunal a special power to be exercised under particular circumstances, and in a prescribed manner, it it indispensably necessary to the valid exercise of the power that such circumstances exist at the time, and that the court proceed in the exact manner pointed out.

The power to proceed given by the 7th section, is when it appears that it would be for the benefit of the ward that his or her real estate, or any part thereof, be sold or leased, and the proceeds put on interest or invested in some productive stock or real estate.

There can be no misconstruing this language, as to the authority delegated to the court. It is to sell or lease the land of the ward whenever it would be beneficial, and re-invest the money arising from the sale or lease in something that would be productive, either in stock or other real estate. It pre-supposes that the ward has an estate in real property, which is not producing anything; and the power is to change it into other real estate or stock which will yield an income.

But no authority whatever is given to take money which is in the hands of the guardian, and purchase real estate with it. If any confirmation of this were wanted, the Sth section of the act places the true meaning beyond all controversy. It declares that the power shall exist only after it is shown by satisfactory proof that it would be for the advantage or benefit of the ward that the real estate, or a part thereof, should be sold or leased. It is only in case the money arises from the sale or lease of the ward's lands, that the court has any authority to order it invested in other lands. And more especially it would have no power, as was done here, to permit the guardian to buy lands, and bind the ward for part of the purchase money, when he had no estate whatever to meet the deficit.

The evidence shows very clearly that the guardian paid more than the land was worth; and, to say the least, there are some suspicious circumstances surrounding the sale. The guardian purchased it of Burns before the latter signed his bond as surety, and Burns had previously offered the land for a less price.

Now if this sale should be held good, Burns, after getting nearly all the money belonging to the minors, would get back the land besides; for the case shows that it is worth little, if any, more than the amount now due. But happily for the

interest of the minors, and the cause of justice, this great wrong will not be perpetrated; for the purchase by the guardian was entirely void, and the action of the Probate Court conferred no authority on him.

The judgment will be reversed and the cause remanded; the other judges concur.

HENRY WATSON, Appellant, vs. C. C. HAWKINS, et al., Respondents.

- Practice, civil—Want of knowledge, etc.—What pleading as to, insufficient.—
 The mere averment that the pleader "does not know" whether a certain state
 of facts exists, without more, is an insufficient denial under the practice act.
 (Wagn. Stat., 1015, § 12.)
- Practice act—Replication—Latitude of denial allowed in.—Under the statute, (Wagn. Stat., 1017, § 15) it would seem that plaintiff in his replication is not allowed that latitude of indirect denial which is permitted to the defendant.
- 3. Suit to foreclose deed of trust—Prior foreclosure—Judgment on note, notwithstanding.—Although, in suit to foreclose a deed of trust given to secure a note, it appear that the deed has already been foreclosed, and the property sold, yet plaintiff may nevertheless obtain a general judgment on the note, if the same be unsatisfied.
- 4. Mortgage—Transfer of lands not an assignment of debt.—The assignment of a debt secured by mortgage, passes the mortgage as incident thereto; but the transfer of the mortgaged land does not per se operate an assignment of the deed and of the debt therein secured.

Appeal from Buchanan Circuit Court.

Collins & Loan, for Appellant.

I. The right of plaintiff to the note was that of owner by assignments indersed on the note, and incident to this was the right to have the mortgaged property sold to pay the debt specified in the note. (1 Hill. Mort., 238, and cases cited in note f.; Jackson vs. Bronson, 19 Johns., 325.)

B. R. Vineyard, for Respondent Hawkins.

I. A deed of land from the mortgagee is not an assignment of the mortgage. (Peters vs. Jamestown, 5 Cal., 334;

Hill. Mort., 4 ed., pp. 236-7; Wilson vs. Troup, 2 Cow., 195.)

Bennett Pike, for Respondents Patterson and Massie.

I. Watson conveyed all his right, title and interest in the land to Patterson, who thereby acquired the right of an equitable assignee of the mortgage. (Jackson vs. Bowen, 7 Cow., 13; 10 Johns., 480; 2 Johns., 87; Johnson vs. Houston. 47 Mo., 227; Walcop vs. McKinney's heirs, 10 Mo., 229; Robinson vs. Ryan, 25 N. Y., 320.)

Sherwood, Judge, delivered the opinion of the court.

Action to foreclose a deed of trust to certain lands in Holt county. On application of defendant Hawkins, Patterson and Massie were served with process, and made additional parties defendant.

By the amended petition, in addition to the ordinary allegations, it appeared that Massie was in possession of the premises.

Hawkins filed his separate answer, wherein he alleged payment of the note, to secure which the conveyance was made; that plaintiff, in order to cheat and defraud him out of his land, had contrived a sham sale thereof in 1863, and obtained a deed therefor from the trustee, one Smith M. White, although he was out of the State when the sale occurred; that in order to better effectuate his fraudulent purpose, the plaintiff, in 1864, commenced a suit in the Holt Circuit Court to foreclose the deed of trust, where, without appearance by defendant, or service on him, either actual or constructive, judgment of foreclosure was rendered, and the property of defendant again sold, plaintiff again becoming the purchaser at a nominal consideration, although the land was very valuable; that having obtained a deed from the sheriff also, for the land thus sold, in the year 1865, he went into possession thereof, and continued to use and enjoy its rents and profits until 1868, when he sold and conveyed the same by deed of geneeral warranty to defendant Patterson, who, in the same year,

sold and conveyed, with the exception of fourteen acres, the land in controversy, to defendant Massie; that the rents and profits of the premises after satisfying the mortgage debt, amount to several thousand dollars, as to which an accounting is asked, and that the trustee's deed and others of like character, encumbering and casting a cloud upon the title, be set aside, etc., etc.

The reply of the plaintiff was in effect a denial of the new

matter contained in the answer.

The defendant Massie admitted his possession of the land, but alleged that he had good title thereto, acquired under the trustee's and sheriff's sale, through the plaintiff as purchaser at such sale; and through Patterson to himself by mesne conveyances, and averred the validity of all the proceedings which resulted in the sale, at which the plaintiffs bought, and thereby he, the defendant Massie, had acquired all the right, title, interest or estate of the plaintiff in said land. Massie also put in issue the allegations of that portion of defendant Hawkin's answer, looking to affirmative relief, and reiterated the validity of his title to the premises in dispute.

The defendant Patterson filed an answer similar to that of defendant Massie, to that portion of defendant Hawkins' an-

swer in the nature of a cross-bill.

Hawkins then filed a denial of those portions of the answers of Patterson and Massie which controverted the truth of the allegations of his answer. In reply to the new matter contained in defendant Massie's answer, the plaintiff denied the validity of the trustee's sale under which he purchased; and as to the sale under the judgment of foreclosure, he averred he "did not know" whether the court rendering that judgment had jurisdiction or not, and submitted that matter to the court for adjudication.

Thereupon, Massie and Patterson, on the ground that the pleadings showed that the plaintiff was not entitled to any judgment against the defendants, moved for judgment on the pleadings. Their motion was successful and plaintiff has

appealed from the dismissal of his suit.

The statement in the plaintiff's reply, that he "did not know," etc., was insufficient as a denial of the allegations of defendant Massie's answer, as the reply in effect admitted that the court had jurisdiction.

Our statute, (Wagn. Stat., 1015, § 12) respecting practice in civil cases, permits the defendant in his answer, to either specially deny the material allegations of the petition, or to deny "any knowledge or information thereof sufficient to form a belief." In Revely vs. Skinner, (33 Mo., 98) a defendant's answer which stated in reference to a certain allegation, "no information thereof sufficient to form a belief," was held not to meet the requirements of the statute, and this ruling followed that of the New York courts, whose practice act, on this point, is identical with our own. (Edwards vs. Lent, 8 How. Pr. R., 28; 1 E. D. Smith, 554; 20 Barb., 348.)

But an examination of the law relating to the reply of the plaintiffs (Wagn. Stat., 1017, § 15), shows that he is required to deny "specifically each allegation controverted by him," and would thus seem not to admit of that latitude of indirect denial on his part allowed to the defendant. But whatever view may be entertained on this point, it is certain the statement of the plaintiff in his reply referred to, was tantamount to neither a direct nor indirect denial of the allegation in the defendant's answer, as to the validity of the proceedings, which resulted in the judgment of foreclosure, so that by the pleadings it stood admitted that a valid judgment of foreclosure had been rendered, and that a valid sale thereunder had taken place. Even, however, should it be conceded that this were true in point of fact, still it by no means follows that the plaintiff's suit should have been dismissed, for although the right of a legally valid foreclosure can only be once asserted against the same land (Buford vs. Smith, 7 Mo., 489), yet this does not prevent the creditor from proceeding in an ordinary action for the residue of his debt.

Upon what theory the court proceeded in sustaining the motion for judgment, we are left to conjecture. Judging from

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the authorities cited, and the position taken here by the successful parties, it might be assumed that the idea prevailed that Massie having, as the pleadings admitted, acquired all the right, title, interest and estate of the plaintiff in the lands he thereby became the assignee of the deed of trust and of the debt it was designed to secure. And the cases of Jackson vs. Bowen, (7 Cow., 13), and Robinson vs. Ryan, (25 N. Y., 320) seem to give countenance to this view so far as mortgages are concerned; but have no reference to deeds of trust. Besides these decisions are based on a special statute of the State of New York relating to the assignment of mortgages

But it has never been held for law in this State, that the transfer of the mortgaged premises would per se carry with it the right to the debt, though the transfer of the latter has always been held to carry the security as an incident (Labarge vs. Chauvin, 2 Mo., 180; Anderson vs. Baumgartner, 27 Mo., 87; Mitchell vs. Ladue, 36 Mo., 533), and as giving the holder of the debt thus assigned the right to resort either to the courts or to the enforcement of the power by the donce thereof, in order to render such security available.

As the defendant Hawkins did not appeal from the decision which so summarily disposed of the plaintiff's petition, as well as his own application for equitable relief, it is impossible to discuss the merits of his case.

The judgment will be reversed and the cause remanded; Judge Vories not sitting; the other judges concur.

Joseph T. Linville, et al., Appellants, vs. Tilman Bohanan, et al., Respondents.

1. Counties—Sale of swamp lands under mortgage given to counties for purchase money—Power of county to purchase at mortgage sale.—Under the act of February 28th, 1855 and the various previous acts relating thereto, the absolute title to the swamp lands in the different counties was vested in them respectively, and where purchased of the county with mortgage to secure the purchase money, the county has the right to buy them in equally as in the case of a pur-

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chase by a private mortgagee. Such a purchase is not to be confounded with the purchase of lands—such as state school lands—to which the counties never had any title. (Ray Co. vs. Bently, 49 Mo., 236; Holt Co. vs. Harmon, 59 Mo., 165.)

Appeal from Nodaway Circuit Court.

Dawson & Edwards, for Appellants.

At the time the county bought in the lands, there was no law authorizing it to do so, and it possessed no powers not conferred by statute. (Reardon vs. St. Louis Co., 36 Mo., 555; State in re, etc., vs. St. Louis, 34 Mo., 546; Ray Co. vs. Bently—expressly affirmed in Holt Co. vs. Harmon, 59 Mo., 165.) And the sale by the County Court, July 12, 1864, and the transfer of Ellis, amount to nothing more than an equitable assignment of the mortgage. (Jackson vs. McGruder, 51 Mo., 55; Johnston vs. Houston, 47 Mo., 227; Robinson vs. Ryan, cited in 3rd. Am. Law Reg., N. S., 58; Pease vs. Pilot Knob Iron Co., 49 Mo., 124; Hunt vs. Hunt, 14 Pick., 374; Jones vs. Mack, 53 Mo., 147; Jackson vs. Minkler, 10 Johns., 479; Jackson vs. Bowen & Neff, 7 Cow., 13; Roberts vs. Jackson, 1 Wend., 473; Honaker vs. Shough, 55 Mo., 472.)

The county, being the mortgagee, could not buy at its own sale so as to cut off the equity of redemption of plaintiffs, even though the sheriff, as agent by appointment in the mortgage, made the sale. (Allen vs. Ransom, 44 Mo., 263; Reddick vs. Gressman, 49 Mo., 389.)

The bond, on its face, recites that it is for school money and the mortgage is drawn under the law relating to the loan of school funds. In Ray County vs. Bently and Holt County vs. Harmon, above cited, this court holds that counties cannot be creditors with respect to the school funds, and cannot therefore buy in the land on the foreclosure of mortgages securing school funds to prevent the loss of such funds. The school lands are vested in the State, in trust for the benefit of the inhabitants of the township in which they are situated. The County Courts are mere trustees with naked powers. They have no trust coupled with an interest.

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Johnston & Jackson, for Respondent.

I. Appellants contend that the county being the mort-gagee could not buy at its own sale. Such sales are not void but voidable. (Thornton vs. Irwin, 43 Mo., 153; Allen vs. Ransom, 44 Mo., 263; Reddick vs. Gressman, 49 Mo., 389.)

II. The mortgage under which the sale was made was a common statutory school fund mortgage, and could be foreclosed upon the order of the County Court, a certified copy of which order had the force and effect of fi. fa. upon a judgment of foreclosure by a court of competent jurisdiction. (R. C. 1855, p. 1425, § 30; Jones vs. Mack, 53 Mo., 147.)

III. The sale thereunder was a judicial sale. At such sales mortgagees are allowed to purchase the premises mortgaged. (Thornton vs. Irwin, supra.) But in case of purchase by a mortgagee at his own sale, a subsequent sale and conveyance to an innocent purchaser, places the premises beyond the reach of a mortgagor, and beyond the power of a court to help them. (Rutherford vs. Williams, 42 Mo., 19; Smith vs. Williams, 12 Mo., 106; Grove vs. Robards, 36 Mo., 525; Card vs. Lackland, 49 Mo., 451.) And a re-sale by the county would pass to the grantee, the legal title in fee, purged of the evil effects caused by the wrongful act of the county. (Fontaine vs. Boatman's Sav. Inst., 57 Mo., 552; 2 Kent., 282, 11th Ed.; Nicoll vs. N.Y. & E. R. R. 12 N. Y.. [2 Kern.,] 121-129; 2 Prest. Est., 50; 3 Cruise Dig., 495-6; §§ 18, 23, 24; People vs. Moran, supra.)

IV. Counties have power to purchase and hold real estate for some purposes. (Wagn. Stat., 441, § 9; 864, § 35; 870, § 21; 1352, § 13; Abernathy vs. Denio, 49 Mo., 468.)

V. If they have such power for any purpose, and abuse or violate the power, it is no concern of the vendor or his heirs. It is a matter between the State and the county. (Grant Corp., 104; 2 Wash. Real Prop., 590-1; 1 Id., 50; Dill. Mun. Corp., § 444; Smith vs. Sheeley, 12 Wall., [U. S.,] 358; Land vs. Coffman, 50 Mo., 243; 2 Kent's Comm., 282; People vs. Moran, 5 Denio, 389; 16 Ohio St., 353; 3 Seld., N. Y., 466.)

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VI. In Ray Co. vs. Bentley, (49 Mo. 236) the power of the County Court with reference to the management of Township School Funds (which belong to the State) was involved. In this, the management of swamp land (which belong to the county) is involved. The County Court is not the agent of the county in the management of the township school fund; but the agent of the State. (Ray Co. vs. Bentley, supra; Marion Co. vs. Mosfitt, 15 Mo., 604-606.)

The County Court is the agent of the county in the management of the swamp lands, the titles being vested in the county. (Barton Co. vs. Walser, supra; Abernathy vs. Denio, supra.) And the county had the power to hold them and to acquire title to them by rescission of the sale. (Same cases and Wagn. Stat., 870, § 21; 864, § 35.)

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding in the nature of a bill in equity brought by the plaintiffs as heirs of Aaron Linville, deceased, asking permission to redeem certain land upon the payment of the purchase money and interest thereon.

The record discloses the following facts: In 1856, Aaron Linville purchased of the sheriff of Nodaway County, certain swamp land belonging to that county. None of the purchase money was paid. In 1859, the commissioner appointed by the County Court to convey swamp lands, made him a deed, and at the same time, Linville executed to the county a mortgage in the form and with the conditions of a statutory school fund mortgage, conveying the land as security for the payment of the purchase money. Linville died in 1861, and prior to his death he had made two small payments of interest only. The principal debt and the accumulated interest remaining unpaid, in 1863, the County Court ordered the sheriff to sell the land under the mortgage. The land was regularly sold, and at the sale the county became the purchaser at a price considerably less than the amount due. Afterwards the county sold the land to one Coover, under whom defendants claim by a chain of mesne conveyances.

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The sole question therefore is, whether the county had the right to make the purchase, or whether it was ultra vires. and should be treated as a nullity. In the case of Ray County vs. Bently, (49 Mo., 236, followed in Holt County vs. Harmon, Feb'y T.,) it was held that where land was mortgaged to a county to secure a loan of school funds, the county on a foreclosure sale had no power to bid in the land in satisfaction of the debt. In that case the county never had any title. The school lands were vested in the State, in trust for the benefit of the inhabitants of the township in which they were respectively situated. The County Courts in such cases are vested with the management of the fund as trustees, but they act in an administrative capacity, in obedience to the laws of the State, and not by virtue of any power derived from the county. The statute points out the manner in which the funds shall be secured and collected, but no power to purchase by the county is conferred.

But the present case stands in a different situation, and ought to be governed by a different rule. The controversy springs out of a sale of swamp lands of which the county was the owner. After the act of Sept. 28, 1850, granting the swamp lands to this State, the legislature, by various acts donated the lands to the different counties in which the lands were situated, and invested in them the fee. By an act approved February 28, 1855, it was enacted that "the several County Courts of this State are hereby authorized to sell and dispose of the swamp and overflowed lands within their respective counties either with or without draining and reclaiming the same, as in their discretion they may think most conducive to the interest of said counties." (Sess. Acts, 1855, p. 160, 2 R. S. 1855, p. 1006, § 3.) The proceeds arising from the sale of the swamp lands were appropriated to the school fund.

By the legislative enactments above referred to the absolute title to the lands was vested in the counties, to be disposed of in the discretion of the County Courts. The counties were then the proprietors with the right of discretionary disposal, Merchants' Bank of St. Louis v. Clavin.

but by a law of the State they were required to apply the proceeds to a particular purpose. In selling the land they possessed the same powers that owners generally possess under like circumstances, one of the most important of which is the right to buy in the premises to secure the debt. As the county in the first instance owned the land, under the provisions of law, when it purchased it in, it stood in the same attitude that it previously occupied before the sale. It owned the land as does an individual—to again be disposed of. Any one who owns the absolute fee, with the power to sell, must necessarily have the right to buy to secure the purchase money. The sheriff, in making the sale, acted as a trustee. The county was the beneficiary, and as such, had the right to buy, and its title cannot be questioned. The judgment was for the defendants and it should be affirmed.

All the judges concur, except Judge Sherwood, who is absent.

THE MERCHANTS' BANK OF ST. LOUIS, Respondent, vs. THOMAS CLAVIN, Appellant.

- Landlord and tenant—Cutting timber from wild lands, vested as part of farm
 —What possession shown by.—Where lessees of a farm embracing wild lands,
 under the terms of their lease—authorizing them to cut timber from any part
 thereof—do in fact fell and remove timber from portions of the wild land,
 such acts are circumstances going to show possession of the whole tract.
- Landlord and tenant—Attornment to stranger.—A deed from a tenant to a
 third party, without the consent of the landlord, can have no effect in depriving the lessor of his possession.
- Landlord and tenant—Person holding under tenant—Adverse title.—One
 holding under a lessee cannot set up a title adverse to that of the original
 lessor.
- Military bounty land—Entry upon must be made, when.—An entry upon military bounty land, to be valid and effectual, must be made within two years after the taking of adverse possession. (Bradley vs. West, ante p. 33.)

. Appeal from Chariton Circuit Court.

Merchants' Bank of St. Louis v. Clavin.

Chas. A. Winslow, for Appellant.

L. H. Waters, with Kinley & Kinley, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action for an unlawful detainer to recover the possession of a quarter section of land. The cause was taken by certiorari to the Circuit Court, and tried before the judge without the intervention of a jury. The court found the defendant guilty of an unlawful detainer, and rendered judgment accordingly.

At the trial, the plaintiff, for the purpose of showing the extent of its claim, introduced in evidence a deed from A. C. Johnson and wife to plaintiff, for several tracts of land, including the quarter section in controversy. It further put in evidence a lease from it to George and William Clavin and one Riley, for the premises known as the Johnson farm, for the year 1867, to end on the first of March, 1868.

It was admitted that the lessees, George and William Clavin, had rented and occupied the Johnson farm for the years 1864, 1865 and 1866, as the plaintiff's tenants.

W. C. Applegate was then introduced, who testified that the Johnson farm consisted of seven hundred and twenty-six acres of various adjoining tracts, and that the land involved in this suit was one of the tracts; that there was a field in this tract, but that the house was half a mile from it, and that the tenants had the privilege of getting fuel, rail timber, etc., off from it, and that they occupied the farm under the lease read in evidence.

Evidence was further given, to show that during the time defendants occupied the Johnson farm as plaintiff's tenants, an agent of the plaintiff gave them permission to remove the rails from the land in controversy for their accommodation, but with no intention of abandoning the possession of the land.

The plaintiff then read a deed from one Gaines to George and William Clavin, dated March 14, 1867, for the land in

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dispute, and also a deed from George and William Clavin to Thomas Clavin, dated August 3d, 1867, for the same land.

For the defendant, testimony was introduced tending to show that when defendants rented the Johnson farm there was some fencing on the land in controversy, and that by permission of plaintiff's agent the rails were taken to repair the fences in another part of the farm; that no timber was used on the land, because there was timber nearer; that the rent was computed upon the improved part of the farm; that when George and William Clavin bought the land of Gaines they bought it for Thomas Clavin, and took the deed in their own name to secure them for the money advanced to pay for it; that Thomas Clavin went into possession about July or August 1867, and that he came to live with them in 1866. and worked for them, and knew they were renting from plaintiff, and knew that there had been a field on the land in question, and that George and William Clavin had raised a crop upon it.

It appears that George and William Clavin relinquished their interest in the premises, if they had any, before the termination of their lease, and that from that time forth Thomas continued to occupy them after the lease was terminated, up to the commencement of this suit.

As no person was in possession when the case was tried but Thomas Clavin, the verdict and judgment was against him only. The holding over after the time for which the demised premises were let, created simply a tenancy at will, as there does not appear to have been any permission for the continuance of the occupancy, and there was no express or implied consent for the same.

It is very plain, under the instructions given, that the court must have found that the land in controversy was a part of what was known as the Johnson farm, and that defendants, George and William Clavin, were in possession of the same under their contract of lease.

But it is contended that there was no evidence to warrant this conclusion. We are of a contrary opinion. The lease 36—vol. Lx.

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gave them authority to cut fuel and take timber from any of the land. They did at one time raise a crop on it, and they used the rails from it. These were all circumstances from which the court might deduce or infer the fact that the tenants were in the same possession that tenants usually are, when they rent a farm and have the privilege of using the wild land. The possession of the whole is included. There is certainly not such a want of testimony as would authorize us to disturb the verdict.

The deed from George and William Clavin, whilst they were plaintiff's tenants, to Thomas Clavin, had no effect in depriving plaintiff of its possession. Except in the cases mentioned in the statute (Wagn. Stat., 880, § 15), an attornment to a stranger is void, and does not affect the possession of the landlord. (Rutherford vs. Ulman, 42 Mo., 216.) Thomas Clavin went in under the tenants, and he cannot set up a title adverse to their lessor in this action.

The question that has been brought to our notice in reference to the premises being military land, and that defendant had held it for two years, will not be considered in this case. (Bradley vs. West, ante p. 33.)

The judgment should be affirmed; the other judges concur.

WILLIAM J. J. RITCHIE, Appellant, vs. Buchanan County, Respondent.

1. U. S. bounties—Buchanan County—Orders for bounty money by—Claim for bounty by previously enlisted soldiers.—By the terms of an order issued Aug. 2nd, 1864, by the County Court of Buchanan County \$120,000 of bounty money was appropriated to those who "shall volunteer for the service of the United States." A subsequent order gave practical effect to the first by declaring an apportionment of \$200 bounty to those who "have and may volunteer in the United States service." Held, that one entering the service prior to the first order had no claim on the county, for the bounty in said orders provided for. The operation of the orders were prospective merely.

Appeal from Buchanan Circuit Court.

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James W. Boyd, for Appellant.

H. M. Ranney, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

The plaintiff enlisted in the service of the United States, on the 21st day of July, 1864, for a term of one year, and four days thereafter was mustered into such service and accredited to the enrolment of Buchanan County, and continued in such service until the expiration of the period of his enlistment.

On the 2nd day of August, 1864, the County Court of that county, made an appropriation of \$120,000, to be applied to the payment "of bounties of soldiers, to be credited to the enrolment of this county, whoever shall volunteer for the service of the United States, and be accepted by the proper officer."

On the 20th day of August, 1864, a further order was made by the County Court, giving practical effect to the first one by making provision for raising the requisite sum by taxation, and providing that the sum of \$200 should be paid to each soldier who had, or who should comply with the terms and conditions of the first order. Of the sum thus ordered to be raised for the aforesaid purpose, only \$87,800 was expended, leaving a balance in the treasury of \$32,200.

A petition asking judgment on the foregoing facts, was held insufficient on demurrer; and this is the only question this record presents.

It would seem too plain for argument, plaintiff having enlisted prior to these orders being made, although he enlisted in the service of the United States, and was credited to the Buchanan County quota, the orders could by no possibility have reference to him, as his enlistment was an accomplished fact, long before the orders were made. And it was obviously out of the power of the plaintiff to accept the terms or comply with conditions of those orders, the sole object of which was prospective and the encouragement of enlistment in the future.

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The words in the order last mentioned, "to pay bounties to those who have and may volunteer in the United States service," clearly have reference to those who, either since the first order was made, had entered the United States service, or who thereafter might do so.

Judgment affirmed, all the judges concur.

Samuel G. Loring, Appellant, vs. John P. Cooke, et al., Respondent.

1. Practice, civil—Non-suit not voluntary where party may obtain judgment and substantial damages.—Where plaintiff is not precluded by the action of the court, in excluding testimony or otherwise, from recovering judgment and also substantial damages—if warranted by proof—non-suit taken by him will be held as voluntary and leaving him without remedy. And it is immaterial that in some particular the rulings made and instructions given may have been objectionable.

Appeal from De Kalb Circuit Court.

S. G. Loring, for Appellant.

J. D. Strong, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff in his petition alleged that the defendants, without leave and wrongfully entered upon his premises and in his dwelling house, and with force and arms, carried away one saddle, the property of the plaintiff, for which he claimed one thousand dollars damages.

There was a second count in which an assault and battery was alleged at the same time and place, but this last count was finally abandoned.

Defendants denied the allegations in the petition, and, as new matters of defense, averred that one Addington, a justice of the peace in Camden township, DeKalb County, made an order in an action then pending before him in pursuance of the statute Loring v. Cooke, et al.

for the claim and delivery of personal property, wherein Gist and Craig were plaintiffs, and S. G. Loring, the plaintiff herein was defendant, which order was directed to the constable of Camden Township, in the said county, and commanded the constable to take from the possession of Loring and deliver to Gist and Craig one saddle of the value of eight dollars; that Addington had full jurisdiction in the premises. Gist and Craig having filed the statement and bond required; and that Addington, being satisfied that the process would not be executed for want of an officer to serve the same, by an endorsement signed by him authorized the defendant, Cook, to execute and return the writ; that Gist and Craig executed and delivered to Cook their bond, and thereupon Cook took with him the defendant, Craig, who was acquainted with the property, to assist in identifying it and proceeded to Loring's residence in the day time, and there found and took possession of the property without force or violence, and without breaking open doors or inclosures.

This new matter set up as a defense, plaintiff moved to strike out, but the court overruled the motion.

The parties then proceeded to a trial before a jury, and evidence was introduced on each side in support of the issues made by the pleadings.

Plaintiff asked the court to give thirteen instructions, all of which were refused. The instructions were obviously faulty and liable to objection.

The only material instruction given for the defendant was that if at the time of doing the acts complained of, Cook was acting under and by virtue of the order of delivery, read in evidence, commanding him to take from the possession of the plaintiff the saddle described in the petition and deliver the same to Gist and Craig, and if Craig was at the time doing said acts with Cook, by his command or request to assist him in identifying the saddle, and if Cook and Craig used no unnecessary violence in the taking of the saddle, then the jury should find for the defendants.

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The court, of its own motion, modified one of the plaintiff's instructions and then gave it. It told the jury that if they believed from the evidence that the defendants went upon the premises of the plaintiff and entered his dwelling house, they should find for him, unless they believed from the weight of the testimony that the defendants, prior to their entering his house, requested permission so to do from him, or notified him of the purpose for which they desired to enter, and their request was refused; and if they entered the premises wilfully, for the purpose of assaulting or abusing the plaintiff or his family, then the jury might add smart money to the damages actually sustained.

Upon the giving of the foregoing instructions the plaintiff took a non-suit with leave to move to set the same aside; and after an ineffectual effort to accomplish that object, he brought

his appeal.

There is nothing in the ruling of the court justifying the plaintiff in taking a voluntary non-suit. He was not precluded from a recovery or even obtaining substantial damages, if his evidence warranted it. Whether all the decisions of the court upon points as they arose, or whether the instructions were entirely unobjectionable, is not the question, as they might have been corrected regularly upon exceptions. But as the plaintiff might still have recovered damages if his evidence, which was all admitted, showed that he was entitled to them, the non-suit was entirely voluntary on his part and he must abide by it.

Judgment affirmed, the other judges concur.

Biggerstaff v. St. L., Kas. C. & N. R. R. Co.

JOSEPH B. BIGGERSTAFF, Respondent, vs. The St. Louis, Kansas City & Northern Railway Company, Appellant.

1. Railroad Corporation law—"Enclosed or cultivated fields" not merely those protected by the owner with lanoful fence.—The statute laying on railroad companies the obligation of fencing their tracks along "enclosed or cultivated fields" (Wagn. Stat., 310-11, § 43,) does not require that the fields should be protected by the owner with a lawful fence on other sides, in order to hold the road for failure to fence the side adjacent to the road-bed. But the incursion of stock and injuries to crops must result from the failure of the company to erect such fence. Where caused by insufficiency of the fence put up by the owner, the company will not be responsible.

Appeal from Clinton Circuit Court.

James M. Riley, for Appellant, cited Trice vs. Hann. & St. Joe. R. R. Co., 49 Mo., 438; Clark's Adm'r vs. Same, 36 Mo., 202; Graw vs. St. L., K. C. & N. R. R., 54 Mo., 240.

Thomas E. Turney, for Respondent, cited Wagn. Stat., 311, § 43; Trice vs. Hann. & St. Joe. R. R. Co., 49 Mo., 438; Anbuchon vs. St. L., K. C. & N. R. R. Co., 52 Mo., 522; Hudson vs. St. L., K. C. & N. R. R. Co., 53 Mo., 525.

NAPTON, Judge, delivered the opinion of the court.

The plaintiff in his petition alleges, that he is the owner of an enclosed and cultivated field, in Clinton County (describing it); that defendant's railway passes through said field; that defendant failed and refused to erect and maintain a fence on the sides of its road, where the same passed through said enclosed and cultivated field, and that in consequence of such failure to construct such fences, horses, cattle, mules, etc., came upon said cultivated fields, during the month of May and summer of 1872, and destroyed plaintiff's crop in said field. The damages are laid at \$200, and the judgment asked is \$400 under the statute.

To this petition there was a demurrer which was overruled. It is unnecessary to state the grounds of the demurrer, as the same questions were afterwards presented at the trial.

The answer ultimately filed is a mere denial of all the allegations of the petition.

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There was a trial and verdict for plaintiff for \$200 which the court doubled and gave judgment for \$400.

The proof was that the road was not fenced on either side, and that the hogs got in by way of the railroad, and destroyed plaintiff's crops.

The court instructed the jury, that if they were satisfied that the defendant's railway passed through a cultivated field of plaintiff, and defendant had not built fences along the sides of its road, where it passed through said field, and that in consequence of said failure to fence, cattle, horses, etc., came upon said field and destroyed crops, the jury were directed to find the value of the crops destroyed.

The defendant asked several instructions, all of which were refused. The court might very well have given all those that related to the exemption from liability on the part of the railroad company for damages occasioned by an insufficient enclosure of the plaintiff. Of course, the company were not responsible for damages occasioned by a defective enclosure of plaintiff's field; but the allegations in this case charge the damage to the failure of the railroad company to build fences; and the proof showed that the damage so resulted, and the instruction given required the jury to find that the damage resulted from the failure of the railway to fence up its road.

The main objection on the demurrer and subsequently on the trial, was that the enclosed and cultivated fields named in § 43, art. II, of the corporation law meant fields enclosed by a lawful fence.

The language of the statute does not require any such restriction; nor does the reason and policy of the law. The damage for which the railroad company is responsible does not spring from any neglect of others to comply with the law, but from their own failure to comply with the law. And if they can show that the damage resulted by reason of an imperfect or insufficient fence of the party suing, they are exempted from liability.

The jury had no right to find a verdict for the plaintiff, except they were satisfied that the damages to the plaintiff's

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crop resulted from the failure of defendant to comply with the requirements of the statute; and the proof on the subject, uncontradicted as it was, clearly established that the hogs, etc. got into the field by the railroad and not through any imperfect fence of plaintiff.

There is no proof in the case that any public road crossed the railway at points adjoining the field; and, therefore, the construction of cattle-guards had nothing to do with the case.

Judgment affirmed; the other judges concur.

Benjamin C. Powell, Defendant in Error, vs. John B. Camp, Plaintiff in Error.

- Practice, civil—Conflict of evidence—Jury.—In civil actions at law, the finding of the jury on questions of conflicting evidence is conclusive.
- Instruction, may be refused, when.—It is no error to refuse an instruction when the same proposition of law is embraced in others already given.
- 3. Unlawful detainer—Appeal from justices—Summary judgment against sureties not allowed.—The statute concerning bonds on appeal from justices' courts in suits of unlawful detainer, (Wagn. Stat., 651, § 15) does not authorize a summary judgment against the sureties on the appeal bond, as in ordinary cases brought up from justices.

Error to Buchanan Circuit Court.

- E. C. Zimmerman, for Plaintiff in Error.
- B. R. Vinyard, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

This was an action instituted before a justice of the peace against the defendant, for unlawfully detaining a certain lot in the city of St. Joseph, described in plaintiff's complaint.

There was a judgment for the plaintiff in the justice's court, from which the defendant appealed, and on a trial anew in the Circuit Court the same result followed.

The record shows that both parties gave evidence tending to prove the respective issues tendered, and the finding of

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the jury on the facts is conclusive upon us. The instructions, therefore, need only be examined.

The first instruction given at the instance of the plaintiff. told the jury that if they believed from the evidence that defendant went into the possession of the premises under an agreement with the plaintiff to occupy the premises as his tenant, they should find for the plaintiff, provided they further found that before the commencement of the suit the plaintiff gave the defendant thirty day's written notice of his intention to terminate the tenancy, and also demanded the surrender of the possession, and that defendant refused to give up the same. The second instruction was, that if the jury found for the plaintiff they would assess his damages at whatever sum not exceeding fifteen dollars (the amount alleged in the complaint) they might believe from the evidence he had sustained by the wrongful holding of the premises by the defendant. The third related to the assessment of the monthly rents and profits, and is in pursuance of the statute. The fourth was in regard to the credibility of witnesses; and the fifth instructed the jury as to the form of their verdict, as is provided for in the statute on the subject.

The defendant asked for two instructions. The first was given; and that merely asserted the proposition that it devolved on the plaintiff by a prependerance of evidence to prove his case. The second, which was refused, instructed the jury, that unless they believed from the evidence that plaintiff, prior to the institution of his suit, was in the actual possession of the premises, then they should find for the defendant.

None of the instructions require any notice or special comment, except the first one given for the plaintiff, and the defendant's second one, which was refused.

The statute says, that when any person shall willfully and without force hold over any lands after the termination of the time for which they were let to him, or when any person wrongfully and without force, by disseizin, shall obtain and continue in possession of any lands, and after demand made

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in writing for the deliverance of the possession thereof by the person having the legal right to such possession, shall refuse or neglect to quit such possession, such person shall be guilty of an unlawful detainer. (Wagn. Stat., 642, § 3.)

Plaintiff's first instruction required the jury to find that the defendant went into possession under an agreement with the plaintiff to occupy the premises as his tenant. The written complaint with the justice directly alleged that plaintiff was the owner, and in possession of the premises when he rented the same to the defendant. Defendant did not deny this at all, but based his defense upon an entirely different matter. The record states that evidence was given by both parties tending to prove the issues raised. No issue was raised upon the question of prior or actual possession; it was a conceded fact. Under these circumstances, therefore, the instruction of the plaintiff comprehended all that was necessary, and it was not error in refusing defendant's second instruction.

The court rendered judgment for the restitution of the property, and also for double the amount of damages assessed, and double the amount of the monthly rents and profits against the defendant and the sureties in the appeal bond. The doubling of the damages and the rents and profits is sanctioned by the statute, but the judgment against the sureties was erroneous. The statute on the subject in relation to appeals in unlawful detainer cases, provides that if the defendant is the appellant, he shall, with one or more sureties, to be approved by the justice, enter into a recognizance to the complainant in a sum sufficient to secure the payment of all damages, rents and profits and costs, that are or may be adjudged against him, conditioned for the prosecution of the appeal. (Wagn. Stat., 651, § 15.) But no provision is made for rendering judgment against the sureties on the bond, as in cases under the practice act, before justices of the peace.

This section has been previously before this court, and it has been held that it does not authorize a judgment on the appeal bond against the principal and sureties in a summary manner, as in ordinary appeals from justices. (Keary vs. Baker, 33 Mo., 603; Gunn vs. Sinclair, 52 Mo., 327.)

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The judgment must therefore be reversed, and judgment will be entered in this court against the defendant alone. The other judges concar.

JAMES EDWARDS, Respondent, v. ROBERT CARY, Appellant.

- Practice, civil—Instructions may be given, when, taken as a whole, they state
 the law properly.—Where instructions, taken together, state the law correctly,
 it is proper to give them, although they are objectionable when taken separately.
- 2. Forcible Entry and Detainer—Plonghing by plaintiff—What proof of actual possession by plaintiff insufficient—What sufficient.—In an action of forcible entry and detainer, proof that plaintiff entered upon the land and ploughed a few furrows across a portion of it, does not make out such a case of actual possession on his part as to warrant a verdict in his favor. Something more is necessary showing an intention to possess, accompanied with acts indicative of that purpose. The visiting, and looking after, and superintending of unoccupied land are acts going to show such intent.
- Practice, Supreme Court—Evidence, weight of.—In civil actions at law, the Supreme Court has nothing to do with the weight of evidence.
- Forcible Entry and Detainer—Title to land cannot be tried in.—In actions of
 forcible entry and detainer, the title to land cannot be inquired into.

Appeal from Carroll Circuit Court.

Hale & Eads, for Appellant cited Garrison vs. Savignac, 25 Mo., 47; King vs. St. Louis Gas Light Co., 34 Mo., 34; Harris vs. Gurner, 46 Mo., 438.

L. H. Waters, for Respondent, cited Bartlett vs. Draper, 23 Mo., 407; Miller vs. Northrup, 49 Mo., 397; DeGraw vs. Prior, 53 Mo., 313; Powell vs. Davis, 54 Mo., 315; Beeler vs. Cardwell, 29 Mo., 72; McCartney's Adm'r vs. Alderson, 45 Mo., 35.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought his action for forcible entry and detainer. The cause was tried before the court without the intervention of a jury, and a judgment was rendered in his favor. The

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evidence for the plaintiff tended to prove that he took possession of the land in controversy under a claim of title in July, 1870, and made some improvements thereon; and that in the spring of 1871, defendant, without his consent, took the possession and kept it; that when he first went into possession the land was uncultivated and unoccupied.

For the defendant there was evidence to show that his grantor, Withers, had been in possession many years prior thereto and had built a house on the land and inclosed a field; that the house was torn down and the rails removed or destroyed, but there were still traces that the field had been in cultivation. The improvements disappeared in 1868, after that the cultivation ceased; but Withers, who did not reside in the county, occasionally came back in the neighborhood to superintend and look after the land, and it was known generally as his.

For the plaintiff the court gave three instructions, which although somewhat objectionable when taken singly and apart, yet when taken as a whole and together, were correct enough; and, as the cause was tried by the court, they cannot be regarded as misleading.

The first thing that the plaintiff did, when he entered the land and commenced his work thereon in July, 1870, was to plow a few furrows across a portion of it, and as to this act, the court declared, for the defendant, that the alleged entry on the land and plowing a few furrows across a portion of it, was not such an actual possession as would authorize a verdict for the plaintiff. This was a correct presentation of the law, on defendant's side. Something more was required, showing an intention to possess, accompanied with acts indicating that purpose.

In reference to the possession of Withers, either by himself or his tenant, and whether he had abandoned it previous to plaintiff's acquiring his right, the court instructed that any act done by the owner of land after his tenant has left it, indicating his intention not to abandon it, but to hold the possession to himself will continue the possession in him,

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and if the court believe from the evidence that after the house and fence had gone down on said land, Withers, who claimed to be the owner of the land, visited the same from time to time, superintending and looking after it, then that is evidence that he, Withers, had not abandoned the pos-The court further declared that if it was found from the evidence that Withers put up a house and inclosed a field of about seven acres upon the land, and that the house was torn down, without the knowledge or consent of Withers, in 1868, and that the fence about the field was burnt off about the same time, and if it was further found that Withers sold the land to defendant, and that up to the time of the sale, there was evidence of the old improvements, and that Withers, after the improvements had gone down, from time to time visited the land, and superintended the same, and that after the sale to the defendant, he-the defendant-continued to look after the same up to the time of the breaking by plaintiff in July, 1870, then the court will find that the possession was in the defendant at the time of the alleged entry of plaintiff.

Defendant asked several other instructions which the court refused, but it is not deemed necessary to consider them, as those already given presented the question of possession in the most favorable attitude in his behalf.

From the theory on which the case was submitted, as illustrated by the declarations, it is manifest that the court, as the trier of the fact, must have found that the land was unoccupied when the plaintiff took possession of it; that the plaintiff's possession was an actual one and consisted of something more than plowing a few furrows; that Withers, by himself and his tenants, had abandoned the possession and was not in possession thereof at the time of the sale to the defendant, and that consequently there was no continuation of the possession in the defendant.

We have nothing to do in this court with the weight of evidence. The testimony was conflicting, and the court having found that plaintiff was in the peaceable possession of the land, and that he was ousted therefrom by the defendant, the ver dict cannot be disturbed.

In actions of forcible entry and detainer, the title cannot be tried or brought in question, and if the plaintiff acquired his possession wrongfully, and the legal title is in the defendant, he must pursue his remedy in a different form.

Judgment affirmed; all the judges concurring.

Jonathan Sharp, et al., Respondents, vs. Chlor Berry, et al., Appellants.

Equity—Resulting trust—What proof necessary to authorize decree of.—To
warrant the destruction of a legal title, by decree of a resulting trust, the
proof should be of the most conclusive character.

Appeal from Livingston Circuit Court.

C. A. DeLieuw, with J. D. Strong, for Appellants, cited Forester vs. Scoville, 51 Mo., 238; Johnson vs. Quarles, 46 Mo., 423; Lead. Cas. Eq., Hare & Wal. Notes, pp. 272, 276, 280, 283; Hill Tr. pp. 148, 149. 151; Sugd. Vend., pp. 391, 395, of vol. 11; Spoor vs. Wells, 3 Barb. Ch. 99 and 194; 1 Hoffm. Chy., 97; 10 Paige Chy., 182.

H. M. Pollard, for Respondents.

When Berry bought these lots with his and Sharp's money and took the conveyance in his own name, he held the undivided half in trust for Sharp. (1 Perry Tr., § 126; Payne vs. Chouteau, 14 Mo., 580; Valle vs. Bryan, 19 Mo., 423; Rankin vs. Harper, 23 Mo., 579; Baumgartner vs. Guessfeld, 38 Mo., 36; Hill Tr., 92 and notes; Jackson vs. Sternberg, 1 John. Cas., 153.)

A resulting or implied trust may be proved by parol, even against the face of the deed, or the sworn answer of the trustee, and it need not be in writing. (Boyd vs. McLeod, 1 John. Ch., 245; Johnson vs. Quarles, 46 Mo., 423; Fausley vs. Jones, 7 Ind., 277; 1 Perry Tr., §§ 137-8, and cases there cited; Faris vs. Dunn, 7 Bugh., 276; Caldwell vs. Caldwell, 7 Bugh.,

515; Letcher vs. Letcher, 4 I. I. Wranch, 590; Larkins vs. Rhodes, 5 Post [Ind.], 196; Larkins vs. Rhodes, 23 Ind., 157.)

NAPTON, Judge, delivered the opinion of the court.

The plaintiffs are heirs of Martin Sharp, and the defendants the heirs of Benj. Berry. The suit was brought in 1871.

The petition alleges that Sharp died in January, 1871, and Berry died in 1865; that Berry, on the 5th of November, 1856, by a purchase at sheriff's sale and by deed from said sheriff to himself, acquired the legal title to lots 6 and 7 in Block 51 in the town of Chillicothe, Livingston county, which deed is duly recorded; that at the time said deed was made, Martin Sharp furnished said Berry one-half of the purchase money, upon the understanding that said deed was to be made to said Berry & Sharp jointly; that said deed was to Berry, solely, through mistake or omission of said Berry; that said mistake or omission was not discovered till after the death of Berry.

It is further alleged, that said Berry also acquired the sole title to lot 3, block 51, by deed from Abithal Wallace, Adm'r of one Bell, dated 13th May, 1857, and by subsequent deed from Abel Love and wife, dated July 3d, 1859, both duly recorded, and said Sharp furnished one-half of the purchase money for this lot, and that the deed to Berry was by mistake or omission.

The petition therefore asks that the defendants, heirs of Berry, be divested of title to the undivided half of these lots, and that the same be vested in plaintiffs the heirs of Sharp.

The answer simply denies these allegations.

After hearing the testimony, the Circuit Court entered a judgment in favor of the plaintiffs. The testimony is preserved in the bill of exceptions, and the propriety of the decree based on it is the only question we are called upon to review.

It would serve no useful purpose to recite the evidence at large, which is voluminous, and is chiefly made up of state-

ments made to the witnesses by the original parties, long since dead, and which of course presents great contradictions. It may be observed, however, that the witnesses seem to be candid and truthful and, no doubt, correctly state the facts they testify to. The difficulty is in the interpretation of the facts.

Some of the facts, however, are clear and beyond controversy. Sharp was the father-in-law of Berry, and they both moved from Illinois to Chillicothe in 1865, and lived in the same house, and Sharp being about 70 years old and Berry somewhat younger, though in bad health, managed the pecuniary affairs of Sharp as well as his own. Mrs. Berry, a material witness for plaintiffs, who was the daughter of Sharp, testifies to this. That Sharp and Berry bought some lots and other land adjoining Chillicothe in common, is conceded, and that Berry owned a lot, and perhaps other land distinct from any interest of Sharp, is conceded.

The testimony of Mrs. Berry is very clear and exact. She states that a few weeks before the death of her husband, he called her attention and that of her sister and father to the fact that all the lots he (Berry) had purchased in Chillicothe, except one (naming it) had been bought in conjunction with her father, and that he furnished half of the money to buy them.

Her sister, Charlotte, is equally confident. She was 59 years old, and states that she had charge of her father's money, and that he came to her after the purchase of said lots and called for his money and counted it, and paid one-half to Berry. She does not say, however, that the money was used to pay for the lots in dispute—a matter, which only tends to confirm the truth of what she does state.

The evidence seems to be about equally balanced as to the admissions of Berry and of Sharp, several witnesses stating that Berry always admitted Sharp and himself to be joint owners, and as many others declaring that Sharp stated that Benj. Berry was the owner of the three lots in dispute. No great importance is to be attached to such evidence—it being

37-vol. Lx.

very natural for witnesses to interpret such declarations according to their bias.

The most important testimony in the case is that of Hayes and Edgerton. Hayes was the owner of the lots six and seven, and it was upon a sheriff's sale of Hayes' interest that Berry became the purchaser. After this sale Hayes rented the premi-

ses, and the following agreement was signed:

"Article of agreement made and entered into this the 1st day of April, 1856, between Benj. Berry and Martin Sharp of the first part, and Robert Hayes of the second part, witnesseth: that the parties of the first part have this day rented their premises known as lots 6 and 7 in block 51, town of Chillicothe, Livingston county, Missouri, to the party of the second part, who hereby agrees to pay the parties of the first part ten dollars per month; which rent is to be paid monthly in advance.

"The party of the second part also binds himself, &c.

"Given under our hands and seals, this 1st day of April, 1856.

"Benj. Berry, [Seal.]

"Martin X Sharp, [Seal.]

"Robert Hayes, [Seal.]"

There was some dispute as to Berry's signature; but it is clear that Berry signed his name and Sharp's to this contract.

Edgerton was the administrator of Berry and it appears that he paid taxes on lots 3, 6, & 7 in block 51, seeing that the legal title, according to the deeds on record, clearly established the title in Berry. This was six years after Berry's death, before the death of Sharp.

There can be scarcely a doubt left on the mind that Sharp and Berry bought these three lots in conjunction. The lease to Hayes is conclusive as to two of the lots. There can be no doubt that Berry signed this lease and wrote Sharp's name to it; and it is impossible to explain such an act, except on the assumption that Sharp was joint owner. Still, it is remark-

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able that Sharp survived Berry for six years and made no claim, and if the title had been conveyed to innocent purchasers, in conformity to the title as it stood on the record, we should decline to disturb it. For, though it is clear that Sharp paid a part of the purchase money, the relation between him and Berry may have induced him to advance the amount as a gift or as a loan, and his silence after Berry's death would seem to confirm this view. But, as the case stands, we cannot disturb the decree, although fully conceding that nothing short of the most conclusive proof would justify a court in enforcing such resulting trusts.

The authorities on the general question are referred to in the briefs. Judgment affirmed; the other judges concur.

H. J. Robertson, Plaintiff in Error, vs. John Neal, Defendant in Error.

1. Judgment—Clerical mistake—Correction nume pro tune.—Where the minute entry, on a judge's docket, shows that a judgment was taken by default, but the judgment was entered by the clerk as final, that entry may be corrected and judgment, in accordance with the facts, entered at a succeeding term.

Error to Clay Circuit Court.

J. T. Chandler, for Plaintiff in Error, cited Wagn. Stat. 1034, § 6; Blaisdell vs. Steamb. Pope, 19 Mo., 157; Blumenthal vs. Kurth, 22 Mo., 173; Gibson vs. Chouteau, 45 Mo., 171; 18 Mo., 432; 1 Cr. 84; Groner vs. Smith, 49 Mo., 318; Pockman vs. Meatt, 49 Mo., 345; State vs. Clark, 18 Mo., 432; DeKalb Co. vs. Hixon, 44 Mo., 341; Hyde vs. Curling, 10 Mo., 359, and Moster vs. Moster, 53 Mo., 326; Downing vs. Steel, Adm'r, 43 Mo., 309, 318; Freem. Judgm., p. 60, § 87; 18 Cal., 219; Freem. Judgm., p. 61, § 89; p. 47, §§ 70, 71; p. 65, § 94; p. 38, § 61; 6 Flor., 721; Freem. Judgm., p. 41, § 63; p. 34, § 56; p. 35, § 57; 2 How. U. S., 263; 8 Pick., 415; Harbor vs. Pacific R. R., 32 Mo., 423, 425, etc.; Hull vs. City of St. Louis, 20 Mo., 584, 586, 587, 588; Blackst. Com., book 3, ch. 25, see pp. 406, 407; Ashby vs. Glasgow, 7 Mo., 320; Ladd vs. Cousins, 35 Mo., 513, 515; Brewer vs. Dinwiddie, 25 Mo.,

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351; 44 Mo., 341, 342; Freem. Judgm., p. 73, § 102; 10 Wend., 560; 20 Wis., 265.)

D.C. Allen, with J. E. Merryman, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

By the record in this case it appears that the plaintiff brought his suit against the defendant and at the return term, no answer having been filed, judgment was given in his behalf. The entry made by the clerk was in the form of a final judgment. At the next term another final judgment was rendered for the plaintiff. At the succeeding term thereafter the defendant came into court and moved to set aside the second judgment, on the ground that at the term previous to its rendition, a final judgment had been entered, and that the court had no further jurisdiction of the cause, and that it was a nullity. Plaintiff then produced the minute entry on the judge's docket, showing that the first judgment was an interlocutory judgment by default, and that the clerk had made a mistake in writing up the same, and he asked to have a corrected judgment nunc pro tunc entered in accordance with the facts. The court refused this request, and then sustained plaintiff's motion to set aside the judgment.

The court committed error. The mere clerical mistakes and misprisions of the clerk will always be amended in furtherance of justice and an entry nunc pro tunc made to conform the record to the truth, provided the record furnishes the evidence to amend by. The evidence of the order made is clear and decisive. The minute made by the judge himself says: "interlocutory judgment by default." It is evident the clerk made a clerical mistake, and did not write up the judgment ordered by the court. The correction should have been made in accordance with the request of the plaintiff.

Judgment will be reversed and the cause remanded; the other judges concur.

END OF MAY TERM, 1875, AT ST. JOSEPH.

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

01

THE STATE OF MISSOURI.

OCTOBER TERM, 1875, AT JEFFERSON CITY.

- *Simmons, Garth & Co., Respondents, vs. Milo Carrier, et al., Appellants.
- 1. Mechanic's lien—Attaches only to structure in which material was actually used—
 Statute and cases construed.—The present mechanic's lien law gives the material man a lien only on the building, into the construction of which the material actually entered. The words, "with intent to defraud the person from whom the materials were purchased," etc., used in § 23 of the mechanic's lien law (Wagn-Stat., 912); must be construed to mean "with intent to deprive him of the lien on which he relied at the time of making the sales." Morrison v. Hancock, 40 Mo. 561 and Hoffman v. Walton, were cases construing the act of 1857 (Sess. Acts 1857, p. 668) before the present modification of the law governing mechanics' liens.

Appeal from Henry Circuit Court.

LaDue & Fyke, for Appellants.

McBeth & Price, for Respondents.

^{*}This case was decided at the January Term, 1875, at Jefferson City, but through mistake was not published in its regular order.—Rep.

Hoven, Judge, delivered the opinion of the court.

This was an action brought by plaintiffs, under the statute in relation to mechanics' liens, against Milo Carrier as contractor and Hannah W. Roberts as owner of the premises sought to be charged with the lien, and John Roberts, her husband, to recover the sum of \$1,228.06 for materials furnished by plaintiffs to said Carrier, for the erection of a store house for the defendant, Hannah Roberts on said premises, and to enforce a lien thereof. The petition contained all the necessary averments.

Mrs. Roberts and her husband answered, denying that the quantity and value of the materials furnished were as alleged; denying the filing of any lien, and averring that the account filed with the clerk was not a just and true account; that plaintiffs had intentionally failed to give all just credits to which defendants were entitled; that all the materials furnished by plaintiffs to Carrier were not used in the building of defendant Roberts, and that the plaintiffs and the defendant Carrier, had colluded to cheat and defraud the defendant Roberts. Plaintiffs replied denying these allegations. Carrier made no defense. The jury returned a verdict for plaintiffs for the sum of \$780.40, and found the same to be a lien upon the premises described in the petition.

At the trial the defendants objected to the introduction in evidence of the statement filed as a lien, for the reason that it was not stated therein who was the owner of the building against which the lien was sought to be enforced, nor who was the contractor. The objection was overruled, the lien admitted, and defendants excepted. The statement filed as a lien consisted of an itemized account of the lumber and materials furnished to Milo Carrier for John and Hannah Roberts, and an affidavit of said Carrier that he bought said materials as contractor for the erection of a store house on the lot described in the petition for his co-defendants, and that the same was used by him in said building; also an accurate description of the premises signed by Samuel D.

Garth & Co., and an affidavit of Samuel D. Garth that the account was just and true after allowing all just credits, and that Hannah W. Roberts was owner of the lot and building described, and that the same was duly described, and that the account accrued within four months. The whole statement taken together contained everything required by the statute, and though not as formal as it might have been made, was certainly sufficient and was properly admitted in evidence.

The testimony was conflicting as to the quantity of materials used in the construction of the building, and also as to the amount of the payments made on the account filed. The verdict of the jury is conclusive on these points, if it shall be found that the case was submitted to them under proper instructions. Among others the following instruction was given for the plaintiff. "The court instructs the jury that it is not necessary for the plaintiffs (to entitle them to a lien) to prove that the lumber furnished was actually used in the construction of the building; it is sufficient in the absence of collusion or fraud, that the lumber was furnished for the purpose of being used in the building."

Among the instructions given for the defendants was the following: "The court instructs the jury that before you can find for plaintiffs in any sum in this cause against said Hannah and John Roberts, you must believe from the evidence that Simmons, Garth & Co. furnished to Milo Carrier lumber and material to be used in the construction of said building; and that said lumber and material was used in the construction of said building, and that said lumber and material, or some portion thereof, remains unpaid for."

These instructions are diametrically opposed to each other. One affirms the proposition that a material man may have a lien on a building, into the construction of which, not an atom of his property has entered, provided only the property for which he claims a lien was furnished by him to be used in the construction of such building. The other denies it.

In support of the position assumed by the plaintiffs, we are cited to the case of Morrison vs. Hancock, 40 Mo. 561.

The statement of facts in that case is meagre, and the language of the opinion slightly obscure, and it may be doubted whether it was intended to decide more than that evidence by the plaintiff that the materials were furnished for the purpose of being used in the construction of the building, would make a prima facie case, and that the statements of the contractor, at the time of making the purchase, were admissible for that purpose. However this may be, that case was a construction of the Act of February 14th, 1857, "for the better security of mechanics and others erecting buildings or furnishing materials for the same in the county of St. Louis," (Sess. Acts 1857, p. 668), and is at most only persuasive authority for the construction contended for by the plaintiffs, of the general law in relation to mechanics' liens, now in force.

The law, as it now stands, first appeared in the General Statutes of 1865, and is a re-enactment for the whole State of the special act for St. Louis county, with some very important modifications and several new sections.

Section 23 of this law deserves especial consideration. It is as follows: "Any contractor or sub-contractor who shall purchase materials on credit and represent at the time of said purchase that the same are to be used in a designated building or other improvement, and shall thereafter use, or cause to be used, the said materials in the construction of any building or improvement other than that designated, with intent to defraud the person from whom the materials were purchased, without first giving due notice to the person from whom the materials were so purchased, shall be deemed guilty of a misdemeanor and, on conviction, shall be punished by a fine not exceeding five hundred dollars." If the proposition asserted in the plaintiff's instruction be correct, it is difficult to perceive how this section can have any intelligible meaning. If the right of a material man to a lien is to remain unaffected by the fact that the materials furnished to the contractor are not used in the construction of the building, in which it was represented by the contractor at the time of purchase they

were to be used, but are used in some building other than the one so designated, how is it possible that such use can be made with intent to defraud the person from whom the materials were purchased? He can only be defrauded by being deprived of the lien he supposed he would have, at the time he parted with the goods, without having any other lien in lieu thereof; or by the substitution of a lien of value inferior to the one he supposed he was getting; and in either event he loses the lien on the building, for the construction of which he sold the materials, for he certainly cannot have a lien on the building, into the construction of which they did enter, and also on the one into the construction of which they did not enter, but for which they were sold. The words " with intent to defraud, etc.," must therefore be held to mean "with intent to deprive the material man of the lien on which he relied at the time of making the sales." If this section cannot be otherwise rationally construed, then in order that it may stand in harmony with the other provisions of the law, the sections giving a lien to the material man must be construed to give it only when the materials actually enter into the construction of the building sought to be charged, and we have no hesitation in so holding, and we do not think this doctrine will be productive of either hardship or injustice. It follows that the instruction given for the plaintiffs was erroneous; and the cause having been submitted on contradictory instructions, this court cannot determine the probable effect of this misdirection on the verdict of the jury, and the judgment will be reversed and the cause remanded. It will not be necessary to notice in detail the remaining instructions given by the court. They related chiefly to the evidence in regard to the credits which it was claimed were allowed or should have been allowed, and the effect of filing an incorrect account, and were substantially correct. It may not be improper to add that the 11th section of the present law in relation to mechanic's liens is a re-enactment of the 10th section of the law of 1857 with additional provisions; and that the case of Hoffman vs. Walton, (36 Mo., 613,) cited by appellant's counsel, which

construed the law of 1857 prior to the modification above noted, is not applicable to the case at bar.

The judgment is reversed and the cause remanded; the other judges concur, Judge Vories absent.

STATE OF MISSOURI, ex rel. W. J. GILBERT, Relator, vs. MICHAEL K. McGrath, Secretary of State, Respondent.

1. Missouri Sup. Ct. Reports—Cost of stereotyping and pay of reporter legitimate charges against State under act of 1868—Subsequent contract.—The act of March 5th, 1868 (Adj. Sess. Acts 1868, p. 44), required the publisher of the Supreme Court Reports (§ 1) "to keep on hand a sufficient number of each volume of said reports, or to make such arrangements as to enable the legal profession of the State to obtain said reports at the prices fixed by said contract," and (§ 2) "to pay for the services of a reporter," etc. Held, that under that act, and the contracts made thereunder, by the State with W. J. Gilbert, as publisher, he was authorized to adopt the plan of stereotyping the several volumes, the stereotype plates to be preserved in order to meet any subsequent demand for the volumes, in case the edition in print should "run short," or become exhausted; and that the expense of stereotyping and the salary of reporter were essential parts of the cost of publishing the Reports, and the State was liable for its proportion thereof.

2. Supreme Court Reports out of print—Contract for reprinting under act of March 8th, 1873.—The act of March 8th, 1873, (Sess. Acts, 1873, p. 30) made it the duty of the Secretary of State to furnish missing volumes of the Supreme Court Reports to Circuit and County Clerks, and that officer was authorized under its provisions to contract with W. J. Gilbert to reprint such of

those volumes as were out of print.

Petition for Mandamus.

Ewing & Smith, for Relator.

The resolution under which Gilbert made his contract (Sess. Acts 1873, p. 407), gave him authority as provided in the act of 1868 (Adj. Sess. Acts 1868, p. 44). That act provides that the Reports shall be published "at the actual cost of the volumes; with ten per cent. added," and we contend, that:

I. The item of \$750.00 per volume for salary of Reporter, in the publisher's account, is part of the "actual cost." (a.) The

services of reporter are as essential to the publication as the binding or setting of type. (b.) The contract itself expressly provides that the salary shall be part of the actual cost. (c.) The former contract was so understood and treated. (d.) The State having paid for like items under the previous contract, and having accepted and previously paid for books under the present contract, is estopped from denying the construction for which we contend.

II. The stereotyping is a legitimate part of the cost of publication. Under the act of 1868 the publisher is required "to keep on hand a sufficient number of each volume of said Reports, or to make such arrangements as to enable the legal profession of this State to obtain said Reports at the prices so fixed by said contract." This provision can never be complied with except by preserving stereotype plates of each volume published. To insist that at the outset the publisher should print enough numbers of each volume to meet all future contingencies of demand and loss, would be a requirement unreasonable to demand, and impossible to comply with.

III. The contract for the missing volumes is in strict accordance with the act of March 8th, 1873, and there can be no objections to it. Besides, it has been repeatedly acted upon, and books have been delivered and paid for under it. And at this time it is too late to question its legality.

Jno. A. Hockaday, All'y Gen'l, for Respondent.

I. The State is not liable for the payment of the reporter, under the act of March, 1868. The second section requires the publishers of the Mo. Reports to contract with and pay such reporter. The services of the reporter constitute no part of the mechanical work of printing and binding the Reports, and the above act never contemplated making the State liable therefor. (Adj. Sess. Acts 1868, p. 44.)

II. The State is not liable to the contractor for the stereotyping of the reports already published. This is done solely for the convenience and benefit of the contractor; the State

receives no benefit therefrom, and ought not to be held liable therefor.

III. The act of March 8th, 1873, (Sess. Acts 1873, p. 30) never authorized the Secretary of State to go into a contract for the publication of the missing volumes of the Reports, and such contract cannot be enforced against the State.

IV. Although the Secretary of State may have attempted to bind the State in the written contract to pay for a reporter, yet if the law did not authorize such contract, the same is wholly void, and the fact that he afterwards allowed the claim for reporter's services, and that the same was paid, does not estop the State from denying its liability now. An agent of the State must comply strictly with the authority given him.

Napron, Judge, delivered the opinion of the court.

This is an application for a mandamus on the Secretary of State, requiring him to certify certain accounts presented by the publisher of the reports of the Supreme Court. These accounts and charges against the State grew out of two contracts made by Mr. Weigel, the predecessor of the present Secretary, with the plaintiff.

The first contract was executed April 10th, 1873, and purports to have been made by virtue of a concurrent resolution of the General Assembly, approved March 24, 1873. By this contract the publisher agreed to furnish such a number of volumes of the reports as might be needed by the State, at the actual cost and ten per cent., but the price was not to exceed \$3.75 per volume. The contract specified particularly the style of printing, binding, etc. The publisher was required "to keep on hand a sufficient number of each volume of said reports, or make such other arrangements as may be necessary to enable the legal profession of this State to obtain said reports at \$4 per volume." It is further agreed and understood "that the party of the second part (the publisher) is to and shall pay for the services of the reporter such compensation as may be agreed on or stipulated by the party of the

second part and the reporter—a just proportion of the expense so incurred, taking into consideration the whole number of volumes published, to be computed in ascertaining the cost of the volumes furnished the State."

Under this contract the bill of the publisher is made out for the copies of volumes 57, 58 and 59, furnished the State, at the rate of \$3.75 per volume, at the same time furnishing the Secretary with an estimate of the cost, which exceeds that price. The only objection to the bill of costs is to two items, the one for stereotyping (\$600) and the other for pay of reporter, which is \$750.

The second contract is dated Oct. 30, 1874, and is also made with the former Secretary. By this contract Mr. Gilbert agrees to "sell to the State 200 copies of certain volumes of the reports,"—naming them—at \$4.00 per volume, and among them certain volumes recited as being out of print—the last to be reprinted and delivered at a specified day. Under this contract the publisher offered 200 copies of the 40th vol. of reports at \$800. The present Secretary (Mr. McGrath), rejects these volumes on the ground that the second contract was not authorized by law.

The objections to the bill of costs furnished by the publisher on the first contract are that the items for stereotyping and for the expense of employing a reporter, are not within the contract, and if within the contract, are not authorized by law.

We have examined the acts on this subject, and think the Secretary (Weigel) had authority to make the contract he did. The act of March 3, 1868, (p. 44) is the authority for the contract. That act required, among other things, that the contract which it required the Attorney-General and Secretary of State to make, should "contain a provision requiring said publisher to keep on hand a sufficient number of each volume of said reports, or to make such arrangements as to enable the legal profession of the State to obtain said reports at the price so fixed by said contract." The Secretary, in his contract, followed the very terms of the act.

The publisher, instead of printing several hundred or a thousand copies which might never be needed, adopted the plan of stereotyping each volume, by which he could, with only the additional expense of paper and press work, at any time increase the number of copies which the State or the profession might need. What mode he might adopt to enable him "to keep on hand a sufficient number of each volume" to meet the requirements of the State and of the profession, was not specified in the law or in the contract. It is apparent that stereotyping was a reasonable and proper one, and that it saved the State, and every one who wished to buy the reports, exorbitant charges for volumes that might be otherwise out of print. We see no objection to this item as a part of the cost.

In regard to the reporter's salary, the contract is specific. The publisher was bound by the act of 1868, to pay a reporter, and his salary was a part of the expense which the publisher assumed. He had no right, under his contract, to charge the State in his estimate of costs, more than the proportionate amount of this salary. We suppose, under the statements in this case, that he did not, as this item was rejected on the ground that the State was not responsible for any portion of the reporter's salary. In the estimate of costs this salary was clearly admissible, as constituting an essential part of the publisher's costs.

In regard to the second contract, it is insisted that the Secretary had no authority to make such a contract. The act of March 8, 1873, declares it to be the duty of the County and Circuit Courts to collect certain volumes of reports heretofore furnished them, and a certified copy is ordered to be sent to the Secretary of State; and then it is provided "that when it shall appear from such certified copy of such list that any of the clerks have not a complete set of said reports of the decisions of the Supreme Court, then said Secretary shall purchase said reports of the decisions of the Supreme Court as may be necessary to make out a complete set of such reports, and furnish them to said clerks."

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The authority, or rather the duty, to purchase reports under the circumstances mentioned, was imposed on the Secretary of State by this act, and under this act the contract was made in regard to certain volumes out of print, that they should be reprinted, and that the publisher should be allowed \$4 per volume. We see nothing unreasonable in this contract. The Secretary was bound to furnish the missing volumes to the different clerks reported to him as being without them, and there is no restriction in the law as to the mode he might adopt to procure them. In regard to such volumes as he was satisfied were not to be obtained by purchase, he contracted for a reprint, and the price he agreed to pay was only 25 cents over the price he had agreed to pay for new reports. We are unable to see that the Secretary (Weigel) exceeded his powers in either of these contracts. We are therefore of opinion that the present Secretary of State should comply with the contracts of his predecessor, and allow the claims presented.

Peremptory mandamus allowed. Judge Vories absent. The other judges concur.

John Schmidt, et al., Plaintiffs in Error, vs. Philip Hess, et al., Defendants in Error.

1. Bequest to a church afterward incorporated—How treated in equity—Faith of grantor how ascertained.—A grant of land to a church is a charity, and although the church is, at the time of the grant, unincorporated so that no grantee is then inesse capable of taking it, and although the language used as indicating the intent may be somewhat obscure, yet equity will effectuate the trust, and protect those equitably claiming under the grant. And, in ascertaining the faith of the grantor, resort may be had to the usages, tenets and ecclesiastical history of the church to which he attached himself.

Error to Cole County Circuit Court.

Lay & Belch, for Plaintiff in Error.

I The specific intent of the donor, if it can be ascertained, will be enforced. (Kinska vs. Lutheran Church, 1

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Sand. Ch., 439; Hoff. Ch., 202; Bowden vs. McLeod, 1 Edw., 588; First Const. Ch. vs. Cong. Soc., 23 Iowa, 567; Harmon vs. Drethen, 1 Spen. Eq., 87; Lawyer, et al. vs. Chipperly, 7 Paige, 281; Hosea vs. Jacobs, 98 Mass., 65; German Ref. Ch. vs. Comm., 3 Barr, 282, 1 Watts, 227, 1 W. & S., 9, 6 Barr, 201, 9 Barr, 321, 6 Wright, 503, 4 N. S. 653, 1 Kenan, 243; Keyser vs. Stansifer, 6 Ohio, 363; People vs. Steel, 2 Barb., 387; Baker vs. Tales, 16 Mass., 506; Wennebenner vs. Colder, 43 Penn. St., 244, 48 Penn. St., 20, Wright 12; Hullman vs. Honcomp, 5 Ohio St., 237, 14 Ohio St., 31, 16 Mass., 504, 50 Mo., 167; State, ex rel. Pittman, et al., vs. Adams, et al., 44 Mo., 571, 577; 2 Dresser, 431; Ang. Corp., 194; 16 Ohio, 583.)

These defendants do not pretend to be Lutheran in doctrine, or that they are any part of a Lutheran Church or congregation. They have withdrawn, and united with a different denomination—a distinct society formed in 1859.

On the other hand the members of the church to which the plaintiffs belong testified that they were all Lutherans. And there was no other denomination of Lutherans in the city. We also prove conclusively that they constitute the same Lutheran congregation in continuation, to which the donors, Routzong and wife, gave their adherence in their life-time, and up to their death.

H. B. Johnson, for Defendant in Error, cited, in argument, the following, among other authorities: Hartford vs. Wetherell, 3 Paige Chy., 304; Kriskern vs. Lutheran Churches, etc. 1 Sand. Ch., 430; Organ Meeting House vs. Seaford, 1 Del. Eq., 457; Keyser vs. Stansifer, 6 Ohio, 363; Attorney General vs. Pearson, 3 Meriv., 352, 395; People vs. Steele, 2 Barb, 397; Presb. Congr. vs. Johnson, 1 W. & S., 9; McGinnis vs. Watson, 5 Wright, 9; Luth. Cong. vs. St. Michael's Ev. Ch., 48 Penn. St., 20; Coit vs. Starkweather, 8 Conn., 289; Jackson vs. Goes, 13 Johns., 518; Powell vs. Biddle, 2 Dall., 70; Miller vs. Gable, 2 Denio, 492; Swed. Ev. Luth. Ch. vs. Shirer, 16 N. J. Eq., 457; McGinnis vs. Watson, 41 Penn.

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Sherwood, Judge, delivered the opinion of the court.

This is a proceeding in the nature of a bill in equity, instituted in the Cole Circuit Court by plaintiffs as trustees of the Evangelical Lutheran Trinity Church, by which it is sought to have vested in themselves, as such trustees, the title to a certain parcel of ground situate in Jefferson City, as a place of interment for that church, in conformity, as it is claimed, to the deed of Christian Routzong, bearing date August 28, 1852, and to restrain the defendants, who are the trustees of the church known as the German Evangelical Central Congregation, and the members of such church, from the use of the ground thus conveyed, until a final hearing, etc., etc.

The deed of Routzong was delivered to his son-in-law, John Guenther, and was made to the "Lutheran Church," and the parcel of ground hereby donated was granted for a burial ground in consideration of the respect entertained by the donor for said church.

Without adverting to the evidence in detail, it shows with very convincing and conclusive clearness that the church to which Routzong belonged was Lutheran in doctrine, that the distinguishing characteristic of that faith consists in accepting all that the Augsburg Confession teaches, and rejecting all that it rejects; that to the most of laymen this church is known and designated by no other name than the "Lutheran Church;" that to this church, although then unorganized, and to the believers in the Lutheran faith, Routzong and his children among the number, Rev. Mr. Kolb first preached, while the meetings were held at the house of John Guenther, Routzong's son-in-law, to whom, as before stated, the deed for the burial ground was delivered; that Mr. Kolb was succeeded in his ministrations to this congregation by Rev. Mr. Knaup, he by Rev. Mr. Mayer, he by Rev. Mr. Sandross, and he by the clergyman at present officiating, Rev. Mr. Thurow; that the

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names of all these ministers are on the list of the Missouri Synod, a strictly Lutheran organization; that the names of none of the ministers of the church to which defendants adhere are to be found on such list, or are recognized by the church to which plaintiffs belong; that it was the intention of the donor, Routzong, to give the burial ground to the church and congregation to which Mr. Kolb preached, and with which the donor and his children worshiped, and that that church which subsequently organized and built a brick house for worship below Zwinger's was the only Lutheran church then or now in Jefferson City; that "the church on the hill," to which the defendants and their associates belonged, entertained theological views widely different from those entertained by the church to which plaintiffs belonged, and that the church to which defendant belonged was not organized and had no preacher until the year 1859, and he, the Rev. Mr. Reiger, did not pretend to be a Lutheran.

The answer of the defendants denied the chief allegations of the petition, and claimed that the deed was intended for the benefit of the church and congregation to which they belonged, and asked for affirmative relief in the form of a decree vesting the title to the premises in controversy in themselves as trustees of the "German Evangelical Central Congregation." The evidence, however, offered on their part, does not seriously militate against or negative that offered by the plaintiffs, but, in many particulars, adds additional force to the testimony already adduced by plaintiffs.

The ground upon which Courts of Equity interfere in cases of this sort is that of effectuating the specific intent of the donor. And on this point the evidence of the son and daughter of Routzong, who worshiped with and espoused the same faith as their father, is entitled to and should receive far more than ordinary weight in determining the purpose by which he was actuated in making the donation.

It is not to be presumed that the grantor would devote his property to the benefit of a church or congregation alien in faith to that to which he adhered; and in ascertaining what Schmidt, et al. v. Hess, et al.

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that faith was and is, resort may be had to the usages of the church to which he attached himself, to the books containing the creed or tenets of religious faith of that church, and to ecclesiastical history. When by a resort to such or similar means, the theological belief of the grantor is clearly ascertained, and when satisfactory information is likewise afforded, as in the present instance, by competent evidence as to the intent of the maker of the conveyance, although the language used in such conveyance as indicative of the intent may not be altogether free from obscurity, a Court of Equity will interpose in favor of those who may equitably claim under the grant, and afford its aid and protection against any infringement of the equitable rights which have thus accrued.

In the leading case in England, that of the Attorney General vs. Pearson, 3 Meriv., 352, the purpose declared in the deed was simply the "worship and service of God." Those words, in England, without more, are deemed to create a trust for the established religion. Yet, the proof having clearly established that the purpose of the trust was the maintenance of dissenting doctrines, the court decreed that purpose to be carried into execution, and would not permit its frustration in the slightest degree. And a similar ruling was made in the case of Kiniskem vs. The Lutheran Churches, etc., 1 Sandf. Chy., 439.

No doubt is entertained that the gift under consideration is a charity, and falls within the meaning of the rules of chancery. (2 Sto. Eq. Jur., § 1164, and cases cited.) And although in consequence of the non-incorporation of the church for whose benefit the grant was made, there was no one in esse, at the time of making the donation, capable of being the recipient of the trust; yet the use being a charitable one, a court of equity, having ascertained the intent of the grantor, will not allow the grant on that account to fail, but will see to its effectuation. (2 Sto. Eq. Jur., § 1165-6, and cases cited; Potter vs. Chapin, 6 Paige, 639, and cases cited; St. Louis County Court vs. Griswold, 58 Mo., 175.)

In conclusion, the plaintiffs were clearly entitled to the relief sought. And, under the circumstances of the case, it was the only measure of complete and effectual redress to which they could properly resort.

The judgment rendered on behalf of the defendants is reversed, and an appropriate decree, in conformity to this opinion, will be entered here, vesting the title to the property in dispute in the plaintiffs, as trustees of the Evangelical Lutheran Trinity Church, and perpetually enjoining and restraining defendants from further infraction of their rights.

Judge Vories absent; Judge Hough not sitting; the other judges concur.

STATE OF MISSOURI, ex rel. CURATORS OF THE UNIVERSITY OF THE STATE OF MISSOURI, Relators, vs. Thomas Halliday, State Auditor, Respondent.

1. State University—Annuity for—Statute of limitation—Fund, how affected by.
—Under the act of March 11th, 1867 (Sess. Acts 1867, p. 9) a certain proportion of the State revenue was set aside annually for the support of the State University. In mandamus against the State Auditor to compel a payment of the annuity for the five years next preceding, held, that the claim was not barred by the limitation of two years contained in the statute, relating to the Treasury Department. (Wagn. Stat., 1336, § 24.) That annuity is not one of those adverse claims contemplated by the statute, requiring a presentation of "the evidence that proves or supports them," but a gratuitous fund set apart by the State, and the amount of which is peculiarly within the knowledge of the State Auditor.

Petition for Mandamus.

John H. Overall, for Relators.

I. This is not such a claim as is required to be "exhibited to the State Auditor for allowance, supported by the evidence thereof, (Limitation Act, Wagn. Stat., 1336, § 24) because:"
1. It is one peculiarly within his knowledge, and of which no one can have information, except through him. (Wagn. Stat., 1257, § 75.)
2. It is his duty to draw his warrant for the amount found by him to be due the University.

This fund is declared to belong to the University, and is to be paid like "other funds of the University" (Sess. Acts 1867, p. 9, § 2). The only "other funds of the University" are the seminary funds, and the duties of the auditor relating thereto are similar to those touching the public school funds. (Wagn. Stat., 1289, § 6.) The school fund is payable "on the warrant of the auditor * * immediately after the apportionment of such monies shall have been made and filed." (Wagn. Stat., 1257, § 77.) Here the apportionment is ascertained by the act of March 10th, 1867 (Sess. Acts 1867, p. 9).

II. As one and three-fourths per cent of the State revenue, after first deducting twenty-five per cent., is, by law, "declared to belong to the University," the amounts not yet paid to the University are held in trust for it, and the statute of limitations cannot bar the claim of a cestui que trust against the trustee. (Marquis Cholomondeley vs. Lord Clinton, 2 Jac. & Walker Ch. R., 1; Baker vs. Whiting 3 Sumn., 486; Kane vs. Bloodgood, 7 Johns. Chy., 90.)

John A. Hockaday, Att'y Gen'l, for Respondent.

I. The relators should have presented their claim to the State Auditor and demanded a warrant within two years after the same accrued. (Wagn. Stat., 1336, § 24.)

II. This statute is general in its application, and affects corporations as well as individuals. (State ex rel. Johnson vs. State Auditor, 48 Mo., 56; Callaway county vs. Nolley, 31 Mo., 393; St. Charles County vs. Powell, 22 Mo., 525; 26 Mo., 453; 8 B. Monr., 259; 8 Ohio, 309; 4 Dev., N. C., 569.)

III. The act of March, 1867, (Sess. Acts 1867, p. 9) provides that the fund claimed by relators "shall be paid to the Treasurer of the Board of Curators as provided by law for the payment of other funds of the University." And § 12, p. 1290, Wagn. Stat., provides that funds belonging to the University shall be paid to the treasurer of the Board of Curators. But, as to the mode of auditing and payment, the statute is silent. The necessary inference is, that they must be audited and paid as other claims upon the treasury, as provided in the statute. (Wagn. Stat., 1334, § 13; 1337, §§ 26, 27.)

IV. The treasurer is the custodian of this, as of all other State funds, and not the Auditor as claimed by relators; hence the Auditor is not a trustee in the sense claimed, but simply controls the disbursement of the fund. If he be a trustee for one part of the State revenue, he becomes such for all of it, and the statutory bar of two years would be unavailing in any case.

There is but one case where the Auditor is made a trustee by express statute, for any funds, and that is under §§ 8 & 9 of the University Act (Wagn. Stat. 1290). Under this act, by direction of the commissioners of the seminary fund, it becomes his duty to invest the same in bonds of the United States. But the funds in controversy are not a part of the seminary fund; they are simply funds appropriated for the use of the University, just as the "criminal costs" fund is set apart and appropriated for that purpose, which can only be drawn upon the presentation of proper certificates and vouchers.

WAGNER, Judge, delivered the opinion of the court.

The relators filed their petition in this court on the 6th day of July, 1874, alleging that under and by virtue of an act of the General Assembly, approved March 11, 1867, they are entitled to one and three-quarters per cent. of the revenue of the State, after deducting one-fourth thereof for the public school fund; that they have received at different times certain sums of money as provided by said act, but of the amount collected on delinquent taxes for the years 1868-'69-'70-'71-'72 and '73 they have received nothing; that they have demanded of the respondent a warrant for the same, which he has refused to issue. They, therefore ask for a peremptory writ of mandamus to compel him to ascertain the amount due them, and draw his warrant on the Treasurer therefor.

For return, as a reason why the writ should not be made peremptory, the respondent states that the relators have failed to present their claim for the funds in controversy to him within two years after the same accrued, and he then sets up the statute of limitations as a bar to the proceeding.

By the second section of an act approved March 11, 1867, it is provided as follows: "There is also set aside and appropriated annually for the support of the State University of Missouri, out of the revenue of the State, after first deducting therefrom the one-fourth of the revenue for the public school fund, one and three-quarters per cent. of such balance of the State revenue; and this is declared to belong to the University, and shall be paid to the Treasurer of the Board of Curators, as provided for by law for the payment of other funds of the University." (Sess. Acts 1867, p. 9.)

In the chapter on the organization of the treasury department, it is declared that "persons having claims against the State shall exhibit the same, with the evidence in support thereof, to the Auditor, to be audited, settled and allowed, within two years after such claims shall accrue, and not afterwards." (Wagn. Stat., 1336, § 24.)

The only question is, whether the statute of limitations is applicable to this particular case. It is not denied, that as a general proposition the statute will run against corporations in the same manner as against natural persons. But the law here sets apart and appropriates annually, a certain fund for the University, which is declared to belong to it, and it is paid to the Treasurer of the Board of Curators in the same manner provided by law for the payment of other funds of the University. The law creating the University, and which donates to it the seminary fund, declares that all interest and profits of the bonds held in trust for the seminary fund shall be paid to the Treasurer of the Board of Curators, who shall be charged therewith by the State Auditor. (Wagn. Stat., 1290, § 12.)

As this is a permanent and continuing fund, and the law itself declares to whom it is payable, it will hardly be contended that if, through accident or neglect, the Treasurer of the Board should not get a warrant for two years, that therefore the Auditor would be entitled to withhold it entirely. The Auditor is the general accountant of the State, and he audits and settles claims against the State, and persons having

such claims must satisfy him of their correctness. ute requires that those claims should be presented within two years, with the evidence that proves or supports them. But here no evidence is required; the University does not even know the amount to which it is entitled, till the auditor makes the apportionment on the basis of the amount of money received. Till that is done no definite amount can be demanded. This fund is placed upon the same foundation as the school fund, and if that was not demanded, accompanied by evidence, within two years, I do not think it would be barred. By section 75 of the law relating to schools, the regular account of the public school fund is to be kept by the Auditor, who is directed, quarterly, to certify to the State Treasurer a copy of such accounts as have not before been reported by him; and in all accounts he is required to state the amount of revenue belonging to that portion of the fund set apart for the University provided for in the Constitution, separate and apart from that belonging to the public schools.

As the fund now in controversy is not set apart by the Constitution, no statement of it as a separate University fund is required to be reported, unless it be brought within the provision of the act of 1867, requiring it to be paid as other funds of the University. Be this as it may, the fund is appropriated and set apart, and exists peculiarly within the knowledge of the State Auditor, and I am clearly of the opinion that it is not of that character of claims contemplated in the statute of limitations above referred to. It is a gift or gratuity by the State, appropriated for a particular purpose, and not an adversary claim held by a party.

I think, therefore, that the relators are entitled to the fund, and that a peremptory writ should be ordered. Judges Napton and Sherwood concur; Judges Vories and Hough absent.

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- 12. Note signed under mistake as to its character—Negligence of maker—Fraudulent representations made to.—What question for jury.—Where one voluntarily signs a promissory note, supposing it to be an obligation of a different character, but has full means of information in the premises, and neglects to avail himself thereof, relying on the representations of another, he cannot set up such ignorance and mistake, as a defense against an innocent holder for value before maturity. (Shirts vs. Overjohn, aute, p. 305, affirmed.) If, however, his signature is procured without negligence on his part, and through artifice or fraudulent representation, the rule is different, and the jury should be left under appropriate instructions to determine these facts.—Frederick vs. Clemens, 313.

BILLS AND NOTES, continued.

- 13. Gaming contract—Draft given in payment of bet, and money collected by indorsee—Liability to owner in case of knowledge of wager—In case of ignorance.—The indorsement of a draft, by the owner, in payment of a gambling debt, although the paper were issued prior to the incurring of the debt and for a legal consideration, comes within the inhibition of the Gaming Act; (Wagn. Stat., 661) and in contemplation of that statute, the indorsed draft may be treated as a security or a new bill. Such indorsement under the statute is roid and conveys no title. And where the draft is assigned or transferred by the party receiving it, to another, also cognizant of the facts, who collects the amount, he will be held to have converted the instrument and its proceeds, and will be liable to the owner for sum collected. And, semble, that the same liability will attach, even though such third party be ignorant of the wager. (See Koch vs. Branch, 44 Mo., 542.)—Williams vs. Wall, 318.
- 14. Promissory note, alteration of —Intent of party making immaterial—Ratification, etc.—A material and intentional alteration in a note by one of the parties, as by adding the words "after due, ten per cent.," will release a party not ratifying or consenting to the change. And the rule holds even though the alteration be made with honest intent, in order to conform the note to the agreement of the parties.—Evans vs. Foreman, 449.

Promissory note—Payments on after alteration—Effect of.—Partial payments after the alteration of a promissory note, and with full knowledge of

the fact, will be held as a ratification of the change.-Id.

16. Promissory note—Alteration made in presence of party his own act, when,— An alteration made in the presence and with the consent of a party thereto will be held, in law, as his own act.—Id.

See Justices' Courts, 2; Mortgages and Deeds of Trust, 9; Practice, civil, Pleadings, 5; Practice, civil, Trials, 13; Railroads, 35.

BOARD OF EQUALIZATION; See Revenue, 1.

Bond—Action upon—All obligees must join.—Where an obligation is executed to two or more jointly, all the obligees must sue upon it. They cannot separate the liability and bring an action in favor of each.—Dewey v. Carey, 224.

See Replevin, 2, 3.

BOUNTY.

1. U. S. bounties—Buchanan County—Orders for bounty money by—Claim for bounty by previously enlisted soldiers.—By the terms of an order issued Aug. 2nd, 1864, by the County Court of Buchanan County \$120,000 of bounty money was appropriated to those who "shall volunteer for the service of the United States." A subsequent order gave practical effect to the first by declaring an apportionment of \$200 bounty to those who "have and may volunteer in the United States service." Held, that one entering the service prior to the first order had no claim on the county, for the bounty in said orders provided for. The operation of the orders were prospective merely.—Ritchie vs. Buchanan County, 562.

BRIDGE.

1. County bridge—Opening of with consent of county—Claim for damages against builder—Waiver of.—The mere fact that a county bridge is thrown open to public travel with the consent of the County Court, does not constitute a waiver on the part of the county of a claim of damages against the builder for delay in finishing it.—Dinsmore vs. Livingston Co., 241.

BUCHANAN COUNTY; See Bounty, 1.

C

CATTLE; See Texas cattle. CERTIORARI; See Practice, civil, Appeal, 2. CHURCH.

1. Bequest to a church afterward incorporated—How treated in equity—Faith of grantor, how ascertained.—A grant of land to a church is a charity, and although the church is, at the time of the grant, unincorporated so that no grantee is then in esse capable of taking it, and although the language used as indicating the intent may be somewhat obscure, yet equity will effectuate the trust, and protect those equitably claiming under the grant. And, in ascertaining the faith of the grantor, resort may be had to the usages, tenets and ecclesiastical history of the church to which he attached himself.—Schmidt vs. Hess, 591.

COLOR OF TITLE; See Land and Land Titles; Limitations. COMMISSIONER; See Contract, 1; Roads, County, 1. COMMON CARRIERS.

1. Carriers—Bill of lading, stipulation against freezing—How far exempts carrier from liability.—Notwithstanding that by the bill of lading it was stipulated that a cargo of potatoes was to be carried by a railroad at the ewner's risk of freezing, yet the road would be liable for all such damage caused by the failure to forward the potatoes with reasonable dispatch.—Read vs. The St. Louis, Kansas City and Northern Railway Company, 199.

Common carrier cannot by contract protect himself against his own negligence.

—The doctrine is now well established in this State that a common carrier can, by special contract, limit his common law liability; but he cannot exempt himself from the consequences of his negligence.—Id.

3. Common carrier—Risks excepted in bill of lading—Exception must be sole cause of damage, etc.—Where the loss of or injury to a cargo, shipped on a railroad, occurs from any of the causes excepted in a bill of lading, in order that the company may be relieved from liability, it must appear that the exception named is the proximate and sole cause of the damage. If the negligence of the carrier mingles with it as an active and co-operative cause, the carrier will be responsible.—Id.

4. Common carrier—Action against for loss of goods—Plaintiff in first instance need only prove loss—Exemption under contract, how pleaded and proved—Negligence of carrier, how made out.—In suit against a common carrier for damage to a cargo of goods, plaintiff in the first instance is only required to prove the delivery and loss, and if defendant pleads an exemption under his contract, the burden is upon him to prove that the loss was occasioned by the cause excepted; but he is not required to go further and prove affirmatively

COMMON CARRIERS, continued.

that he was guilty of no negligence. Proof of that fact will rest upon the plaintiff. And such proof is made out by showing that the injury might have been avoided by the exercise of reasonable skill and attention on the part of the carrier.—Id.

 Railroad strike no excuse for delay in delivering freight.—The sudden and wrongful refusal of its employees to work will not excuse a railroad company for failure to transport freight in the usual time.—Id.

CONSIDERATION; See Bills and Notes, 7, 13; Railroads, 35; Sheriff's sales, 3. CONSTITUTION; See Texas Cattle, 2.

CONTRACT.

- 1. Contract—Work done for county under—Approval of by Commissioner—Allegation as to—Suit on quantum valebat—Opinion of Commissioner in case of.

 —In suit against a county under a contract for public work, where by the terms of the agreement the work was to be done to the satisfaction of a commissioner, his approval must be alleged and proved, unless plaintiff claims that his rejection of the work arose from caprice or malice, and was without foundation; in which case such fact may be alleged and a recovery still had in equity. Where the action brought against the county merely on the quantum valebat, the opinion of the commissioner would have no more binding authority than that of any other witness.—Dinsmore vs. Livingston County, 241.
- 2. Parol agreement as to interest not binding, when.—Proof of a parol understanding that the borrower of money should pay ten per cent. interest thereon, is incompetent. Such an agreement, in order to have binding force, should be

in writing. (Wagn. Stat., 783, § 2.)-Id.

- 2. Railroad—Deductions from pay rolls of workmen of amounts due merchant for supplies—Implied assumpsit.—A railroad company having become liable to pay the wages of workmen employed by contractors (Wagn. Stat., 302, § 10) deducted, on their pay rolls, charges for sundry goods theretofore furnished the men by a merchant under an agreement entered into by him with the contractors. On the rolls, and pursuant to the agreement, the amounts purchased were entered as payments made on the wages account and as due from the contractors to the merchant; Held, that, being a stranger to the agreement, the company was not liable to the merchant under it for such advances; and its deductions of the amounts due the merchant from the wages of the men would not, of itself, raise an assumpsit in his favor against it. And it would be liable, notwithstanding, to the employees for the unpaid balances. But they having acquiesced in that mode of settlement, the merchant could recover those sums from the company on an implied undertaking to pay the same.—Schuster vs. Kas. City, St. Jo. & Council Bluffs R. R. Co., 290.
- Assumpsit—Promise made for third party.—A promise made for his benefit
 may be sued upon by a third person.—Id.
- 5. Contract in writing for lumber for building school house—Delivery of lumber to superintendent—Payment of instalments as work progresses—Subsequent westing of title—Parol agreement of School Board—Written contract, how far may be varied by—Transfer of possession.—Under a written contract with a School Board, a builder agreed to furnish lumber for the erection of a school house, payment to be in instalments as the work progressed; and bond was given to secure his compliance with the contract. Afterward at a meeting of

CONTRACT, continued.

the Board, from a conversation among the members, it appeared that there was a verbal understanding that a certain sum should be advanced to the builder for the purchase of lumber, which should thereupon become the property of the Board. But no minute or record of such arrangement was preserved. The lumber was bought by the builder and placed on the school premises in charge of a superintendent appointed by the Board. For an unpaid balance of the purchase money, the vendor, took a bill of sale of part of the fumber on the premises, and brought replevin therefor. Held, that the general agreement embraced in the written contract, that the lumber should be paid for in instalments as the work progressed, and the fact that under the contract the material was placed on the premises in charge of the superintendent, especially when taken in connection with the giving of the bond, would not, on the purchase and delivery of the property, vest the title of the same in the Board. The written contract would not be held to show such intent. And the oral agreement, by the terms of which the property was to so vest, being inconsistent therewith, was inadmissible to affect the written contract.

As to whether the builder's title to the lumber could be transferred merely by the parol agreement above referred to, so as to preclude his creditors without any visible change of possession, quare f—Chambers vs. The Board of Education of the Town of Cameron, \$70.

 School Boards—Proceedings of, how proved.—Proof of regulations, orders, etc., of School Boards, is not limited to the copies of those proceedings referred to by the statute. (Wagn. Stat., 1872, p. 1267, § 13.)—Id.

Contracts in writing—How far may be varied by subsequent parol agreement.

—Written contracts may be altered by subsequent parol agreements in relation to the time of performance on matters about which the contract makes no provision.—Id.

8. Insurance—Premium note—Parol contract set up as a defense against—Contracts partly written and partly parol, latter part may be shown by parol-Rescission—Recoupments, etc.—Where, in suit by an insurance company on a premium note, the defense was that the notes were given in consideration of a parol agreement by plaintiff to loan defendant certain sums of money, held, 1st. The note and agreement constituted parts of the same contract; and only a part of it being in writing, parol testimony was admissible to prove the remainder. 2d. Notwithstanding the failure to comply with his agreement to loan, defendant would be liable on his premium note unless he offered to rescind the contract of insurance by returning the policy and demanding the note. 3d. Without such defense the amount of plaintiff's recovery on the notes would nevertheless be subject, under appropriate pleading, to be reduced to the extent of the damage suffered by defendant in consequence of plaintiff's failure to make the loan.—Life Association of America v. Cravens, 388.

9. Contract of attorney for services.—Full performance prevented by death—Action against administrator to recover back part proceeds of land conveyed to scure fee—Substitution of new attorney.—Where an attorney took a conveyance of a tract of land to secure his fee for services to be performed in certain specific cases, of which services his death prevented more than a partial performance a proper proceeding would be by bill against his estate, to set aside the

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CONTRACT, continued.

conveyance upon a tender of so much of the fee agreed upon as was found to he really due; but when the land was sold by his estate, plaintiff might recover back the surplus proceeds over and above the ascertained value of such services.

In such a case the administrator could not defend against the recovery of such surplus by showing a readiness to perform the remaining services through another attorney.—Callahan v. Shotwell, Adm'r, 598.

See Agency; Bailment; Bills and Notes; Common Carriers; Conveyances; Corporations, 4; Corporations, Municipal; Gaming contract; Insurance, Fire; Mortgages and Deeds of Trust; Railroads, 35; Reports of Decisions, 1, 2; Roads, county, 1.

CONVEYANCES.

- Acknowledgment—Certificate, allegation of as to venue.—Where a conveyance
 is acknowledged before an officer authorized to take the same within the limits of his jurisdiction, if will be presumed that the acknowledgment was actually taken within such limits, without an averment of that fact contained in
 the certificate.—Bradley v. West, 33.
- 2. Land, contract for sale of—Title bond—Conveyance by obligor to third party—Rescission of original contract—Suit by obligee for purchase money, etc.—Where one takes possession of land under a bond given to him for conveyance thereof on payment of the purchase money, a deed by the owner to a third party in the meantime, does not of itself, regardless of the circumstances, amount to a rescission of the original contract so as to authorize the obligee to abandon the land and receive back whatever purchase money he has paid out; ex. g. where the grantee in the deed agreed to receive the purchase money and to give the obligee another bond, with like condition to convey on receipt of the money, and especially where the obligee himself agreed to the substitution, the latter cannot recover back money paid out for the land and improve ments thereon. And most certainly such action will not lie where the obligor has the land re-deeded to himself, and then tenders the deed.—Cooper vs. Stockton, 81.
- 3. Conveyances of military bounty land—Acknowledgments—Certified copies, when admissible.—Where a deed conveying military bounty land is acknowledged according to the statutes of Missouri, a certified copy thereof may be shown in evidence without previous proof of the loss or destruction of the original, and it is immaterial whether it be acknowledged in or out of this State. Sections 35, 36 and 38 of the statute relating to conveyances of real estate (Wagn. Stat., 278, 279) refer exclusively to conveyances made outside of this State and acknowledged in conformity to the lex loci,—but defective under the Missouri statute. (Totten v. James, 55 Mo., 494, criticised.)—Tully v. Canfield, 99.
- 4. Deeds—Terms, "grants, bargains and sells" amount to quit-claim, when.—A deed which "grants, bargains and sells all the right, title and interest" of the grantor is merely a quit-claim conveyance and inoperative to convey an after acquired title.—Butcher vs. Rogers, 138.
- 5. Parol evidence as to technical terms in a deed.—Where terms are used in a deed that require explanation to those unfamiliar with the business to which they pertain, parol evidence in regard to them is proper, although the terms are not ambiguous.—Elliott vs. Secor, 163.

CONVEYANCES, continued.

- 6. Conveyance, recording of, after judgment, or filing of transcript from a justice and before sale-Effect of as to purchaser at sheriff's sale-(Davis vs. Ownby, 14 Mo., 170).-The purchaser at a sheriff's sale will not take the title as against a deed made prior to the judgment and recorded before the sale-or, where the suit is before a justice, after the filing of the transcript with the circuit clerk-and before sale-although the deed is recorded after the rendition of judgment or filing of transcript. The object of the record is to impart notice to subsequent incumbrancers and purchasers-e. g. vendees at sheriff's sale. (Davis vs. Ownby 14 Mo., 170.) The plaintiff in the judgment acquires a lien which will bind the estate against any subsequent act of defendant. And the rule is not changed by reason of the fact that the deed is executed after the rendition of the judgment or the filing of the transcript, where the person to whom the conveyance is afterward made is at the time of the judgment or filing in possession of the property with a bond for title and has made lasting and valuable improvements, so that he would be entitled to a decree for specific performance as against his obligor.-Black vs. Long, 181.
- 7. Conveyances—Married women—Acknowledgmet—Delivery.—The consent of a married woman to the delivery of a deed executed by her, is evinced by her acknowledgment, which is the only way known to our law by which the consent of a femme covert can be exhibited.—Devorse v. Snider, 285.
- 8. Acknowledgments—Form of, in conveyances of land partly owned by wife and partly by husband, what sufficient.—Lands owned by the husband and those owned by the wife in fee, may be embraced by the same conveyance; and under the Statute of 1855, the wife was not required to make two acknowledgments, one for her own lands, and one relinquishing her dower in the lands of her husband. Nor was it essential that a single acknowledgment should contain distinct references to the lands owned by the wife and these owned by the husband A single acknowledment would suffice. The clause relinquishing her dower will be held applicable to all lands in which she had dower, and surplusage as to all lands owned by her in fee.—Barker vs. Circle, 258.
- 9. Conveyance inter partes—Sheriff's sales—Accuracy of description—What necessar in two cases.—In the interpretation of deeds inter partes, courts are not inclined to insist upon that accuracy of description required in sheriffs' deeds or other transfers of property in invitum.—Carter vs. Holman, 498.
- 10. Deed—Description of land in—Patent, ambiguity in—Identification of aliunde.—In an agreement for a mortgage of land the property was referred to
 as "a farm owned by me in townships sixty-five and sixty-six of Worth county," * * * "south of Grant city, one and one-half miles." But neither
 section nor range were given. It appeared that the maker of the agreement
 lived in another county, and that the tract claimed to be that described by the
 deed had no house upon it, and was not known as the farm of the maker, nor
 generally understood to be his. Held, that the ambiguity in the description
 was patent, and that the uncertainty was not cured by the evidence aliunde.—Id.

See Church, 1; Ejectment, 2; Fraudulent Conveyances, 1; Land and Land Titles, 27, 28, 29; Landlord and Tenant, 4.

CORPORATIONS.

- 1. Execution—Sale of land owned by corporation under—Purchase by Treasurer—Title acquired not adverse to company.—Where under execution against a corporation, land held by its trustees was purchased by one who was stockholder and treasurer of the company, it was held that the purchase must be regarded as having been made for the benefit of the association, and that the title which he acquired could not be considered as hostile to the company.—McAllen vs. Woodcock, 174.
- 2. Practice, civil—Joinder of co-plaintiff against his consent—When proper.—In suit against a corporation, where a trustee was made co-plaintiff without his knowledge and against his consent, and prayed a dismissal as to himself on that ground: Held, that although he might have been joined as co-defendant, yet it was not error in the court to overrule the motion, and retain him as plaintiff, on the execution by his co-plaintiffs of a bond to indemnify him against costs.—Id.
- 3. Practice, civil—Allegation as to existence of corporation—What sufficient.—
 In suit by a corporation, an averment that plaintiff was a corporation "duly incorporated under and by virtue of an act of the General Assembly of the State of Missouri entitled," etc., was a sufficient allegation of plaintiff's corporate existence.—Chillicothe Sav. Ass'n vs. Ruegger, 218.
- 4. Pleadings—Allegations as to corporate existence in suit by company on contract, etc.—One having made a contract with a company, in its corporate name, thereby admits that it is duly constituted a body politic and corporate, at the time, and is estopped from setting up for defense by way of demurrer or otherwise, the non-allegation of these facts by the company in suit on the contract. And in such suit the company need not state where it has its residence or principal place of business.—National Ins. Co. vs. Bowman, 252.
- 6. Corporation, illegal act of—When may be investigated by private citizen, collaterally.—The only exception to the rule which prohibits collateral inquiry by a private citizen into the supposed illegal acts of a corporation, is where such investigation is expressly authorized by the legislature.—Martindale vs. K. C., St. Jo. & C. B. R. R., 508.

See Church; Insurance, Fire; Schools and School Lands.

CORPORATIONS, MUNICIPAL.

- 1. Corporations, municipal—Trustees of—Debt for engraving scrip—Warrant issued for—Town not bound, when.—The trustees of a municipal corporation created under and controlled by the statute relating to towns and their incorporation, (Wagn. Stat., 1813) have no authority to contract a debt for engraving scrip to be issued by said trustees, nor can they render the town liable for the payment of a warrant issued in satisfaction of the debt. And although the warrant, if signed by the proper officer, prima facie imports validity, its issuance may be shown to be ultra vires.
- Those who deal with the officers of a municipal corporation must ascertain, at their peril, that these agents are acting in the scope of their lawful powers.—

 Cheeney v. The Inhabitants of the Town of Brookfield, 53.
- St. Joseph, charter of—Liability for street improvement.—Under the charter of
 St. Joseph, the city could not be held liable, in any manner whatever, for work
 done which was made a charge upon adjoining property.—Saxton v. City of
 St. Joseph, 153.

CORPORATIONS, MUNICIPAL, continued.

- 3. Municipal corporations, concurrence of mayor and council necessary to bind -Street improvements-Claim of contractor against adjoining proprietors; against city, for work ; for expenditures in attempt to collect claim-"Ignorantia legis."-The adoption by a city council of a resolution, ordering the city engincer to let out a contract for macadamizing, etc., a street, without the concurrent action of the mayor, is a nullity, imposing no legal obligation whatever upon the municipality, and gives the contractor no right of action against the adjoining property owners. Nor will the city be liable to him for expenditures in endeavoring to enforce the collection of his tax bills against itself. The principles of law that govern cases of illegal or imperfect execution of municipal powers, or cases where an absolute duty is imposed upon the corporation, have no application to the state of facts supposed. For a municipality cannot act at all excent through the mayor and council, and the propriety of improving a street is a matter resting in the sound discretion of its officers. Moreover, the contractor must be held to know the law, and will be presumed to know that his claim is invalid. -Id.
- 4. Municipalities—Liability for negligent performance of work—Rule as to, not applicable to defective legislation.—The rule, that when a city undertakes the execution of public work authorized by its charter, though it is not bound to undertake the same, it is liable for negligence in the performance of such work, does not apply to defective municipal legislation.—Id.
- 5. St. Joseph, charter of—Special taxes—Liability of owner prima facie—Assessment apportioned to frontage—Charges for work not in contract—Interest, tender of, etc.—In suit on a special tax bill for street improvements, brought under the amended charter of St. Joseph, (Sess. Acts, 1865, p. 433, et seq.) held:
- 1st. The bill made the owner prima facie liable for the amount of the debt charged and constituted a valid claim until rebutted.
- 2nd. The amount assessed must be in that proportion to the whole charge under the contract which the frontage of the lot taxed bears to that of the whole work undertaken.
- 3rd. The fact that some small amount of work or material may have been apportioned and charged in the bill other than that called for by the contract, will not necessarily invalidate the bill; but the additional amount so assessed may, on proper showing, be deducted.
- 4th. In case the bill contains such excessive charges, accruing interest can be stopped only by tendering the true amount; then in event of non-acceptance thereof, if the holder fail to recover more, he can have no interest.
- 5th. The failure of the city engineer to record the bill in a book kept for that purpose, will not defeat the bill.—Neenan v. Smith ,292.
- Municipal charter—Power of officers limited by.—The law is well settled that
 the power of municipal authorities is confined to the limits prescribed by the
 charter, and ordinances in conformity therewith.—Leach vs. Cargill, 316.
- 7. Special taxes—Failure of city engineer in pursuance of ordinance, to permit property owners to macadamize part of street adjoining.—Where an ordinance for the macadamizing of a street, provides that the city engineer shall give the adjoining property owners the privilege of doing the work in front of their property, proof of failure to give such opportunity will defeat an ac-

CORPORATIONS, MUNICIPAL, continued.

tion on a special tax bill against one of said property owners. And a mere newspaper advertisement for proposals for said macadamizing will not amount to such offer, unless made to have that effect by the terms of the ordinance.—Id. COSTS.

 Practice, civil—Judgment for costs—Appeal.—A judgment for costs is not a final judgment from which appeal will lie.—Conu vs. Ferree, 17.
 See Administration, 4, 5.

COUNTY; See Bridge, 1; Court, County; Swamp Lands, 1.

COUNTY COLLECTOR; See Revenue, 2.

COURT, COUNTY; See Bounty, 1; Bridge, 1; Contract, 1; Revenue, 2; Road, County, 1.

COURT, PROBATE; See Administration; Guardian and Ward; Revenue, 2. COURT, SUPREME; See Practice Supreme Court.

CRIMES AND PUNISHMENTS.

- 1. Crimes and punishments—Attempt to wound, main and disfigure—Constr. Stat.,
 —A felonious "maining, wounding and disfiguring" (Wagn. Stat., 450) is
 "another felony" as contemplated by § 32. And a felonious assault with intent to maim, etc., is an assault to commit a felony and so an offense under the statute. (State v. Thompson, 30 Mo. 470.)—State vs. Brown, 141.
- Misdemeanors, statutory—Jurisdiction of—Power of Legislature to determine.—The legislature has the undoubted right, in reference to statutory misdemeanors, to say in what particular jurisdiction they shall be tried, and to make that jurisdiction exclusive of all others.—State vs. Gordon, 383.
- 3. Misdemeanors, jurisdiction as to—Words of restriction and exclusion—Construction of statute.—When the power to hear and determine statutory misdemeanors is given to a municipal corporation, but no words of exclusion or restriction are used, the remedies between the State and the corporation will be construed to be concurrent; but where the manifest intention is that the prosecution shall be limited exclusively to one jurisdiction, that intention must prevail. And authority was unquestionably conferred on the city of Liberty by its charter of 1868, (Adj. Sess. Acts 1868, p. 221, § 12,) to take exclusive cognizance of misdemeanors.—Id.

See Practice, Criminal; Texas Cattle, 1, 3. CRIMINAL LAW; See Crimes and Punishments.

D.

DAMAGES.

1. Damages—Personal injuries by railroad to servant, caused by defective track—Duty of company to keep track safe.—In suit against a railroad company by an employee, for personal injuries caused by defective track, an instruction declaring defendants exempt from liability, notwithstanding its unsafe condition, if plaintiff knew, or could by the exercise of ordinary diligence have known, of the state of the track, is properly refused. It is not the business of the servant to ascertain whether the machinery and structure of the road are defective; but the duty of the company is to keep them in a safe condition; and it is responsible for injuries resulting from such defects.—Porter vs. Hann. & St. Jo. R. R. Co., 160.

DAMAGES, continued.

- 2. Damages—Action for killing plaintiff's husband—Dying declarations—Res gestæ.—In suit against a railroad company for the killing of plaintiff's husband, the declarations of the latter immediately after receiving the injuries, as to the cause of his death, are admissible as a part of the res gestæ.—Entwhistle vs. Feighner, 214.
- 3. Damages for killing plaintiff's husband—Defendant competent'witness—Const. Stat.—In suit of damages against one for killing plaintiff's husband, defendant is a competent witness. In such case, there was no contract or cause of action (Wagn. Stat., 1372, § 1), to which the deceased was a party. His death was a sine qua non to the existence of the cause of action.—Id.
- 4. Damages—Injuries by railroad train—Contributory negligence—Causes, remote and immediate.—Although one injured by a railroad train was guilty of some negligence which contributed to the injury, yet if those in charge of the train might have avoided the injury by the exercise of ordinary care and prudence, the company would be liable, provided that the negligence of the one injured was the remote or incidental, and that of the road the direct, cause of the accident.—Whalen vs. St. Louis, Kans. City and Northern Riy., 323.
- 5. Damages by railroad to person—Loss of limb—Measure of damages, etc.—In assessing damages for loss of limb caused by a railroad, the jury should consider the age, situation, bodily suffering and mental anguish of the person injured, and the loss sustained by him in consequence, and the extent to which he was thereby disabled from self-support.—Id.
- Personal injuries by railroad—Negligence—Intoxication.—One standing in a state of intoxication, on a railroad track at the usual time of running of the train, and in a position of exposure, is guilty of negligence.—Id.
- 7. Railroads—Crossing used by passengers—Diligence of company and passengers—What necessary.—Where a railroad track is crossed by a path commonly used by passengers, trains should use great diligence to guard against accident; and a like diligence and caution devolve upon passengers.—Id.
- 8. Damages -- Excessive -- Interference by Supreme Court. -- The Supreme Court will not ordinarily interfere on the ground of excessive damages. -- Id.
- 9. Railroads—Damages caused by surface water—By diversion of watercourse—Rule as to company's liability.—Where damages caused by the construction of a railroad, result from the flooding of surface water, and not the diversion of a natural stream or water course, the company will not be liable, if, in such construction, the company is reasonably prudent and careful to avoid injury. (Munkers vs. Kansas City, St. Joseph & Council Bluffs R. R. Co., post p. 334.)—Hosher vs. K. C., St. Jo. & C. B. R. R., 329.
- 10. Pleadings—Damages caused by diversion of stream; by surface water—Variance.—Where plaintiff charges that his land was flooded and damaged, by the diversion, by a railroad company, of a stream of water from its natural channel, he cannot recover, on proof showing that the injuries were caused solely by surface water. And the distinction between the cases and the relative liability of the company should be explained to the jury under appropriate instructions.—Munkers vs. K. C., St. Jo. & C. B. R. Co., 334.

DAMAGES, continued.

Damages, excessive—Remittitur in Supreme Court.—When excessive damages are given by a jury, a remittitur thereof may be entered in the Supreme Court, without sending the party back to the lower court.—Johnston vs. Morrow, 389.

See Common Carriers, 1, 2, 3, 4; Eminent Domain, 1; Railroads, 3, 4, 5, 6, 7, 8, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28; Replevin, 2; Slander, 1; Texas Cattle, 1.

DEATH OF DEFENDANT; See Execution, 1.

DECISIONS OF SUPREME COURT; See Reports of Decisions.

DEPOSITIONS; See Evidence, 2.

DESCRIPTION; See Conveyances.

DOWER; See Land and Land Titles, 16; Wills, 1.

DYING DECLARATIONS; See Evidence, 4.

E.

EDUCATION; See Schools and School Lands. EJECTMENT.

- Ejectment—Chain of title through common source.—In ejectment where both trace title through the same source neither need go farther back.—Butcher vs. Rogers, 138.
- 2. Deed by married woman having only equitable right—After-acquired title of —Ejectment brought under—Estoppel under former covenants—Claim of defendant for affirmative relief in such suit, etc.—A married woman bought and paid for, and entered upon and permanently improved, certain land, but took no deed therefor; subsequently, conjointly with her husband, she conveyed the same by deed of trust with covenants of warranty, and after sale and purchase under the trust deed, being at that time discovert, obtained from her vendor a quit-claim deed for the property.

Held, that her covenants in the trust deed would not estop her from maintaining ejectment on an after acquired title, paramount to the right conveyed by her; but the legal title received by her from her vendor, the right to which she had previously acquired by her purchase and possession, was, in equity, in her hands, or in the hands of those having notice of her purchase and subsequent conveyance, subordinate to the right transferred by her deed of trust.

Where suit in ejectment is so brought, although defendant might properly ask to have plaintiff's title vested in himself, yet his failure to do so would not impair his right to hold possession against plaintiff claiming under that title with notice of defendant's equity.—Barker vs. Circle, 258.

See Forcible Entry and Detainer, 2; Limitations, 9, 17; Witnesses, 1.

EMBEZZLEMENT; See Administration, 7.

EMBLEMENTS; See Landlord and Tenant, 1.

EMINENT DOMAIN.

 Eminent Domain—Benefits deducted from assessment of damages for land taken for railroads—Rule as to—Testimony touching.—In the assessment of damages for land taken for railroad purposes the benefit which is to be deducted from the damages which the owner sustains is the direct and peculiar benefit resulting to the land in particular, and not the general benefit accruing to

EMINENT DOMAIN, continued.

it in common with other land which is enhanced in value by the building of the road. (St. Louis & St. Jo. R. R. Co. vs. Richardson, 45 Mo., 466.) And the land should be assessed at its value when taken. But witnesses may testify as to its value before and after the taking, as tending to shed light on that point.—Hosher vs. K. C., St. Jo. & C. B. R. R. Co., 303.

EQUITY.

- Equity—Non-suit with leave, etc.—Appeal.—Whether in suit in equity, a non-suit with leave to move to set aside can be taken so as to bring the case before the Supreme Court for review, doubted.—Conn vs. Ferree, 17.
- Equity—Jurisdiction—Dower—Fraud.—Courts of equity have jurisdiction
 of actions to set aside conveyances obtained by fraud, and to secure assignment of dower.—Devorse vs. Snyder, 241.
- 3. Land and land titles—Deed obtained without knowledge of grantor—Assent presumed after knowledge of record and acquiescence in occupation by grantee.—Semble, that although the grantor in a deed does not actually deliver it to the grantee, yet if he is afterwards aware of its being recorded, and of occupation of the land by the grantee for a long period of years, his assent may be presumed.—1d.
- 4. Equity—Title to land in third party cannot be set up, when.—A. having a title bond for certain land, and having paid the purchase price, conveyed the same to B., but the deed was not recorded. B. sold the tract to C., and returned the deed to A. with directions to cancel it, and make a conveyance directly to C., and such deed was accordingly executed with full covenants and for adequate consideration. In a suit by C. for a specific performance of his contract by A., wherein B. asserted no claim, held that parties having knowledge of the deed to plaintiff could not attack his title on the ground that A., by his deed to B., had divested himself of title, and that the return of the instrument did not re-invest it in A.—Williams vs. McGuire, 254.
- 5. Bill in equity to re-docket case on the ground of fraudulent defense and re-moval of cause from docket.—Where it appears that through the fraud and combination of the attorneys, a false and sham defense to plaintiff's suit is interposed, and the court is so practiced upon and deceived that no judgment is obtained, and, without any order or action of the court, the case is suffered to disappear from the docket, plaintiff will be entitled, on a proper case presented, to have the cause re-docketed and a trial instituted on the pleadings as they remain on the files of the court.—Doss vs. Davis, 300
- 6. Equity suit to remove trustees and set aside sale made by them of land—Decree ordering payment of balance of purchase money—Vendor's lien.—The creditors of an insolvent debtor brought suit in this State to set aside the sale of his Missouri lands, made by his trustees, and to remove the trustees, charging unfitness and unfaithfulness on his part, and fraud in the sale. The court ordered their removal and the appointment of the county sheriff in their stead, but confirmed the sale. Prior to this proceeding, the creditors had sued the trustees in Kentucky, where all the parties resided, but the action was undetermined. Held, that although the Missouri Court might order their removal, so far as their trusteeship here was concerned, it could not, in the above state of case, while this suit in Kentucky was pending, and without any issue authorizing such a decree, direct the purchaser to pay over the unpaid purchase money to

EQUITY, continued.

the sheriff. If an enforcement of the vendor's lien were needed, in consequence of the inability of the purchaser to pay the amount of the notes, suit might be brought in this State, but must be instituted on the notes.—Bank of Kentucky vs. Poyntz, 531.

Equity—Resulting trust—What proof necessary to authorize decree of.—To
warrant the destruction of a legal title, by decree of a resulting trust, the
proof should be of the most conclusive character.—Sharp vs. Berry, 575.

See Church, 1; Contracts, 9; Execution, 4; Fraud; Injunction; Lis Pendens; Mortgages and Deeds of Trust, 6, 7, 8; Practice, civil, Pleading, 1; Quieting Titles; Revenue, 2; Sheriff's Sales, 4, 6.

ESTOPPEL; See Ejectment, 2.

EVIDENCE.

- 1. Legislature—Journals—How far evidence.—Printed copies of the journals of the legislature are only prima facie evidence of the original legislative rolls and may be rebutted by testimony showing their inaccuracy. Hence they cannot be used in the Supreme Court, where not introduced as evidence in the trial of the cause below.—Bradley vs. West, 33.
- 2. Practice, civil—Depositions—Objections to should be made, when.—After parties have been induced to go to trial with the belief that depositions will be admitted in evidence, it is too late to raise objections to irregularities in their taking—such as that the notice was insufficient.—State vs. Dunn, 64.
- 3. Conveyances of military bounty land—Acknowledgments—Certified copies, when admissible.—Where a deed conveying military bounty land is acknowledged according to the statutes of Missouri, a certified copy thereof may be shown in evidence without previous proof of the loss or destruction of the original, and it is immaterial whether it be acknowledged in or out of this State. Sections 35, 36 and 38 of the statute relating to conveyances of real estate (Wagn. Stat., 278, 279) refer exclusively to conveyances made outside of this State and acknowledged in conformity to the lex loci,—but defective under the Missouri statute. (Totten v. James, 55 Mo., 494, criticised.)—Tully vs. Canfield, 99.
- 4. Damages—Action for killing plaintiff's Husband—Dying declarations—Res gester.—In suit against a railroad company for the killing of plaintiff's husband, the declarations of the latter immediately after receiving the injuries, as to the cause of his death, are admissible as a part of the res gester.—Entwistle vs. Feighner, 214.
- 5. Damages for killing plaintiff's husband—Defendant competent witness—Const. Stat.—In suit of damages against one for killing plaintiff's husband, defend. ant is a competent witness. In such case there was no contract or cause of action (Wagn. Stat., 1872, § 1) to which the deceased was a party. His death was a sine qua non to the existence of the caues of action.—Id.

See Bills and Notes, 8, 10; Contract, 2; Conveyances, 5, 10; Forcible Entry and Detainer, 5; Fraudulent Conveyances, 1; Guardian and Ward, 1; Insurance, Fire, 3; Land and Land Titles, 10, 11; Mortgages and Deeds of Trust, 5; Practice, civil, New Trials, 1; Practice, civil, Trials, 2, 11, 13, 14; Practice, Supreme Court, 1, 2, 4; Sheriff's Sales, 5, 6; Slander, 1.

EXECUTION.

- 1. Execution—Death of defendant, between levy and sale, no notice being given to sheriff or purchaser, does not avoid sale collaterally.—Where judgment is obtained in a suit by attachment, and between the levy of execution and sale defendant dies, his death, not being brought to the knowledge of the sheriff or the purchaser, will not render the sale and deed thereunder nullities, which may be, for that reason, impeached in a collateral proceeding.—Lewis vs. Coombs, 44.
- 2. Execution—Sale of land owned by corporation under—Purchase by Treasurer—Title acquired not adverse to company.—Where under execution against a corporation, land held by its trustees was purchased by one who was stockholder and treasurer of the company, it was held that the purchase must be regarded as having been made for the benefit of the association, and that the title which he acquired could not be considered as hostile to the company.—McAllen vs. Woodcock, 174.
- 3. Executions—Selections by married woman whose husband has absconded—Const. Stat.—Action against officer, how brought.—Under the statute concerning Executions (Wagn. Stat., 605, § 14), a married woman, whose husband has absconded, has a right to make the selections provided in § 11 of the same statute, and can maintain an action for the value of the property so selected when withheld from her by the officers. And such action is properly brought in the name of the State to her use. But she cannot, under § 14, recover from the sheriff the value of articles sold by him, which, under § 9, are exempt from execution. The act of March 3rd, 1873 (Sess. Acts 1873, p. 45), is not a legislative interpretation of § 14.—State to use of Houseworth vs. Dill, 433.
- 4. Equity—Bill to enjoin execution sale—Plaintiff in execution made sole defendant.—Where property is seized on execution, a bill to enjoin the sale which makes the plaintiff in execution the sole defendant, is as effectual as though the officer were made party defendant, and included in the decree.—Holthaus vs. Hornbostle, 439.
- 5. Married woman may hold personal property exempt from execution, and without trustee.—In equity a married woman may hold personal property to her sole and exclusive use, without the intervention of a trustee, and will be protected therein against the claim of the husband and his creditors, where the deed is not made in fraud of their rights. And her right is not in any wise limited to stocks, etc., referred to in § 19, ch. 94, Wagn. Stat. p. 986. And such gift from a third party will not be affected by the insolvency of the husband.
- The property may be given by parol. But proof of the gift must be clear and positive, and free from any suspicion of fraud.—Id.
- 6. Wife's land in another State—Sale of—Proceeds of exempt from execution.—Where the husband, as agent of the wife, receives a check for the price given for the purchase of land owned by her prior to marriage, under the statute relating to married women (Wagn. Stat. 935, § 14), the check is exempt from execution for his debts. And this is the rule although the lands are in another State.—Sumner vs. McCray, Garn., 493.
- Execution—Nodaway county—Act of Feb. 1863, as to.—The act of February 15, 1863, in relation to Nodaway and other counties, kept an execution, issued in one of those counties, alive after the return day.—Lillard vs. Shannon, 522.

EXECUTION, continued.

 Execution levied on land not vitiated by prior levy on personalty.—The levy of an execution on personal property does not invalidate its subsequent levy on land.—Id.

See Administration, 8; Injunction, 1; Judgment, 5.

EXEMPTION; See Execution, 3, 5, 6.

F

FENCES; See Railroad, 3, 4, 18, 20, 28, 36. FORCIBLE ENTRY AND DETAINER.

- Forcible entry and detainer—What questions may be passed on by the jury.—
 In suit of forcible entry and detainer the question what acts constitute possession is for the court, and whether they have been done is for the jury. And the court may, under proper instructions, leave the whole question to the jury where there is any evidence tending to show a bona fide prior possession by plaintiff.—DeGraw vs. Prior, 56.
- 2. Forcible entry and detainer—Possession of plaintiff must be bona fide and not a mere sham—Instances.—Possession of land to authorize an action of forcible entry and detainer must be bona fide and not a sham. Thus, where plaintiff was driven off by stress of weather and returned when permitted, such temporary absence will not defeat his action. On the other hand, where he attempted to get possession in order to throw the onus of a suit in ejectment on another, by simply going on the land and plowing for half a day or so and then absenting himself for six mouths or more, one entering on the land at that time would have a right to presume that his project had been abandoned.—Id.
- 3. Forcible entry and detainer—Possession by owner, what necessary to sustain a verdict.—The possession of uncultivated land necessary to support an action of forcible entry and detainer on behalf of the owner, does not require the constant presence of plaintiff either in person or by agent. Any acts done by him on the premises showing an intention to hold possession, for the purpose of cultivation and improvement, will be sufficient. Thus where plaintiff traced out the boundaries, threw up mounds at the corners of part of the land, and when defendant came on the ground, ordered him off with the assertion that the land belonged to plaintiff, proof of these facts would support a verdict.—Bradley vs. West, 59.
- 4. Forcible entry and detainer—Conditional purchase of land—Party holding under vendee, liability of—Three years possession, Constr. Stat.—Where one in possession under an inchoate contract for the purchase of land, turns his possession over to a third party, the latter will not be subject to an action of unlawful detainer by the original vendor under § 3 of the Forcible Entry and Detainer Act. (Wagn. Stat., p. 642.) And even where the possession is obtained under demise or lease or by disseizin—as contemplated by that statute—if defendant has been in uninterrupted occupation for three years, he will be protected. (See § 27, Id., p. 646; also Biddle vs. Ramsey, 52 Mo., 153.)—Hann. & St. Jo. R. Co. vs. Hill, 281.
- 5. Forcible Entry and Detainer—Ploughing by plaintiff—What proof of actual possession by plaintiff insufficient—What sufficient.—In an action of forcible entry and detainer, proof that plaintiff entered upon the land and ploughed a few furrows across a portion of it, does not make out such a case of actual

FORCIBLE ENTRY AND DETAINER, continued.

possession on his part as to warrant a verdict in his favor. Something more is necessary showing an intention to possess, accompanied with acts indicative of that purpose. The visiting, and looking after, and superintending of unoccupied land are acts going to show such intent.—Edwards vs. Cary, 572.

 Forcible Entry and Detainer—Title to land cannot be tried in.—In actions of forcible entry and detainer, the title to land cannot be inquired into.—Id.

FRAUD; See Bills and Notes, 9, 12; Equity, 2, 5; Execution, 5; Fraudulent Conveyances.

FRAUDULENT CONVEYANCES.

1

Fraudulent conveyances—Transfer of all one's property except that exempt from
execution—Presumption arising from.—The fact that one being heavily indebted
conveys away all his real and personal property, "except such as is exempt
from sale under execution," is a circumstance tending to show fraud in the
grantor.—Boyd vs. Jones, 454.

2. Land, fraudulent purchase of—Title placed in innocent third party—Effect resulting.—Where a fraudulent purchaser of land, in order to shield himself, puts the title in a third party, having no knowledge of the fraud, in an action to set aside the sale, the plea that the grantee was an innocent purchaser without notice will not avail.—Lillard vs. Shannon Co., 522.

G.

GAMING CONTRACTS; See Bills and Notes, 13. GARNISHMENT; See Injunction, 1. GUARDIAN AND WARD.

 Evidence—Verbal directions of Probate Judge.—The verbal directions of a judge of Probate will not protect a guardian and are not receivable in evidence in defense of his action.—Folger vs. Heidel, 284.

2. Ward, grainitous maintenance of—Subsequent claim for—Payment of by guardian—Estate not liable, when.—The question whether an allowance out of his estate shall be granted for the support of a ward, depends very much on the facts of the particular case. It may, in some instances, be granted for past maintenance; but never, where one has taken and brought up an infant as a member of his family, without any apparent claim or expectation, until afterward, of an allowance from the estate for such support. And a guardian paying such charge cannot hold the estate therefor.—Id.

3. Guardian and curator—Authority given to by Probate Court of Andrew county to invest funds of ward in real estate—Authority dehors the statute.—Under the act of March 19th, 1866, (Adj. Sess. Acts 1866, p. 83) the Probate Court of Andrew county cannot confer upon a guardian authority to invest the money of his wards in real estate, unless the fund be itself proceeds derived from the sale or lease of their lands. And the guardian has no such power independent of the statute. Such purchase with a trust fund not so arising is absolutely void.—Woods v. Boots, 546.

H.

HANNIBAL AND ST. JOSEPH RAILROAD; See Railroads, 1, \$1. HUSBAND AND WIFE; See Execution, 3 5, 6; Land and Land Titles, 16, 18, 20, 21; Wills, 1; Witness, 1.

T.

INFANTS; See Guardian and Ward. INJUNCTION.

- Injunction—Decres against one not party—Garnishment.—In a suit for injunction a decree against one not made a party, is unauthorized. Nor will such a suit without issue of execution or statutory process for attachment, warrant the summoning of garnishees.—McLaughlin vs. First Nat. B'k Kan. City, Mo., 437.
- Equity—Bill to enjoin auction sale—Plaintiff in execution made sole defendant.

 —Where property is seized on execution, a bill to enjoin the sale which makes the plaintiff in execution the sole defendant, is as effectual as though the officer were made party defendant, and included in the decree.—Holthaus vs. Hornbostle, 439.

See Administration, 8.

INSTRUCTIONS; See Practice, civil, Trials.

INSURANCE.

1. Insurance—Premium note—Parol contract set up as a defense against—Contracts partly written and partly parol, latter part may be shown by parol—Rescission—Recoupments, etc.—Where, in suit by an insurance company on a premium note, the defense was that the notes were given in consideration of a parol agreement by plaintiff to loan defendant certain sums of money, held, 1st. The note and agreement constituted parts of the same contract; and only a part of it being in writing parol testimony was admissible to prove the remainder. 2d. Notwithstanding the failure to comply with his agreement to loan, defendant would be liable on his premium note unless he offered to rescind the contract of insurance by returning the policy and demanding the note. 3d. Without such defense the amount of plaintiff's recovery on the notes would nevertheless be subject, under appropriate pleading, to be reduced to the extent of the damage suffered by defendant in consequence of plaintiff's failure to make the loan.—The Life Association of America vs. Cravens, 388.

INSURANCE, FIRE.

1. Agent—Acts of sub-agent when binding on principal.—The rule that an agent cannot delegate his powers unless the sub-agency be directly authorized or ratified by his principal, with full knowledge of the facts, has no application to acts purely ministerial. In such cases if he directs the act or being aware of the circumstances, afterward adopt it as his own, that is sufficient.—Grady vs. The Am. Cent. Ins. Co. of St. Louis, 116.

2. Agent—Authority of sub-agent to sign insurance policy—How granted—How shown.—Where a policy of insurance is signed by a sub-agent for the agent, and the latter afterwards takes the policy, receives the premium, and, with full knowledge of the facts, re-delivers the instrument, it thereby becomes the act of the company as much as though signed by the agent himself. And to

INSURANCE, FIRE, continued.

prove that such authority is recognized in the sub-agent by the company, similar previous transactions may be shown in evidence.—Id.

- 3. Evidence—Execution of insurance policy—What testimony sufficient to give question as to, to jury—Proof heard by court in absence of jury.—In suit on a policy of insurance, where defendant pleads non est factum, any evidence tending to show the execution of the instrument, even though contradicted, will be sufficient to give the paper to the jury, who are then to determine what weight shall be attached to the testimony. As to the right of the court to pass upon testimony touching the execution of a paper, a distinction may be drawn between a document whose execution is the main issue being tried, and one the execution of which is preliminary or collateral to the main controversy. In the former case it is a mere usurpation of the province of the jury, and a practice totally unauthorized, for the court to withdraw the panel and proceed of its own motion to hear testimony touching the execution of the instrument.—Id.
- 4. Insurance policy—Suit upon—Defenses—Inconsistency.—[The court intimated without expressing an opinion, that in suit on an insurance policy the defense of non est factum, and "that the policy was to be issued on property to be occupied as a boarding house," etc., etc., might be inconsistent pleas.]—Id.
- 6. Foreign fire insurance agent doing business in this State not compelled to obtain licenses.—Since the passage of the Insurance act of 1869, (Wagn. Stat., 732) an agent of a foreign fire insurance company, doing business in this State, is not liable to the penalty fixed by the statute (Wagn. Stat., Art. IV, p. 781, § 4) for failing to procure a State license. § 44, Art. III, of the act of 1869, (Wagn. Stat., 777-8) requiring the payment into the Insurance Department of certain fees and dues in lieu of other taxes, etc., embraced in its operation foreign as well as domestic companies doing business in this State, and had the effect of repealing Art. IV, so far as it required the procurement of State licenses by foreign companies. But such companies will continue liable under Art. IV, for fees, licenses and taxes for county and municipal purposes.—State vs. Beazley, 220.

INTEREST; See Contract, 2.
INTOXICATION; See Damages, 6.

JEOFAILS; See Judgment, 2, 8, 4, 7.

JUDGMENT.

 Conveyance, recording of, after judgment, or filing of transcript from a justice and before sale—Effect of as to purchaser at sheriff's sale—(Davis vs. Ownsby, 14 Mo., 170).—The purchaser at a sheriff's sale will not take the title as against a deed made prior to the judgment and recorded before the sale—or, where the suit is before a justice, after the filing of the transcript with the circuit clerk—and before sale—although the deed is recorded after the rendition of judgment or filing of transcript. The object of the record is to impart notice to subsequent incumbrancers and purchasers—e.g. vendees at sheriff's sale. (Davis vs. Ownby, 14 Mo., 170.) The plaintiff in the judgment acquires a lien

J.

JUDGMENT, continued.

which will bind the estate against any subsequent act of defendant. And the rule is not changed by reason of the fact that the deed is executed after the rendition of the judgment or the filing of the transcript, where the person to whom the conveyance is afterward made is at the time of judgment or filing in possession of the property with a bond for title and has made lasting and valuable improvements, so that he would be entitled to a decree for specific performance as against his obligor.—Black vs. Long, 181.

- 2. Attachment-Appearance of defendant-Special judgment against attached property, when erroneous-Amendment of, at subsequent term, for irregularity, etc .- What will be ordered by the Supreme Court .- Where defendant in a suit by attachment appears to the action, a special judgment condemning the attached property to be sold, is erroneous; as defendant may have other property with which to satisfy the judgment, and would then have a right to elect what property shall be sold. (Kritzer vs. Smith, 21 Mo., 296.) But presumptively such judgment is that of the court and not an error of the clerk and it cannot be set aside, at a subsequent term, on the ground of clerical mistake where nothing in the record or the judge's docket, or clerk's minutes, or papers on file, shows such mistake; nor can such judgment be set aside for irregularity or informality. (What constitutes irregularity in judgments, considered.) But where such judgment is brought before the Supreme Court, that tribunal will enter up a general judgment in accordance with the statute (see Wagn. Stat., p. 188, § 36; p. 189, § 40), or remand the cause to the Circuit Court, with directions to do the same thing .- Jones vs. Hart, 351.
- 3. Judgment cannot be expunged at subsequent term for lack of docket entries, etc. to prove its rendition.—A judgment cannot be expunged at a term subsequent to that of its rendition, on the ground that neither the judge's docket nor the clerk's minutes show the rendition thereof. In such case the record of the judgment imports absolute verity and cannot be assailed for the lack of such vouchers.—Id.
- 4. Attachment—Appearance—Special judgment—Error, presumptively that of clerk—Correction may be made on verdict and files—Erroneous judgment amendment of under statute of jeofails—Entry nune pro tune not revisable, when.—In an attachment cause, where the defendant is served with process or appears to the action,
- 1st. A general judgment follows the verdict for the plaintiff as a legal conclusion, and if by reason of clerical mistake, such judgment is not entered, but the clerk, by mistake, enters instead thereof, a special judgment, the facts by which the proper amendatory entry can be made, are furnished by the verdict and files in the cause; and such entry may be directed by the court at a subsequent term. And when there is doubt as to whether the improper entry was, in fact made by the clerk or the court, the presumption will be that the judgment was correctly rendered on the verdict, and incorrectly entered. 2nd. But even where the judgment itself is apparently erroneous, if the amendment is not "against the right and justice of the matters in suit" (Wagn. Stat., 1037, § 20), the court possesses the power under the statute of jeofails (see Wagn. Stat., 1034-5, § 6; 1036, § 19; 1037, § 20), to amend it at a subsequent term. And such amendatory judgment should not work a reversal unless "error" was thereby committed "materially affecting the merits;" (Wagn. Stat., 1067, § 33.) And the

JUDGMENT, continued.

fact that the amendment is not such "error" is conclusively shown by a mandate from the Supreme upon Circuit Court to make the same amendment. Srd. And, in any event, where the appeal is taken from the judgment entered nunc pro tune, and not from the judgment originally entered, the one last named cannot be revised in the Supreme Court.—Per Sherwood, J., dissenting.—Id

- 5. Execution sale—Erroneous judgment—Title—Right of defendant.—While all rights which have been acquired, bona fide, by any third person, under an execution issued under a judgment, when the execution has not been impugned as improper or invalid, will be respected and preserved; yet if the judgment be set aside or reversed, the defendant is entitled to his property, seized under such execution, if in the hands of the plaintiff or the sheriff, or to the proceeds of the sale if it had been sold to any other person; and this principle would reach any right acquired by the plaintiff by motion against the defendant on a delivery bond.—Jones vs. Hart, 362.
- 5. Judgment in one county lies on land in another, when.—A judgment renderedin one county becomes a lies on land in another only from the date of its receipt by the sheriff of the latter county. (R. C. 1858, pp. 741-2, § 21.)—Lillard vs. Shannon Co., 522.
- 7. Judgment—Clerical mistake—Correction name pro tunc.—Where the minute entry, on a judge's docket, shows that a judgment was taken by default, but the judgment was entered by the clerk as final, that entry may be corrected and judgment, in accordance with the facts, entered at a succeeding term.—Robertson vs. Neal, 579.

See Administration 4, 6; Bills and Notes, 1; Lis Pendens; Mortgages and Deeds of Trust, 9; Practice, civil, 1; Practice, civil, Appeal, 1, 3; Prac-Practice, civil, Pleadings, 6; Replevin, 1.

JUDICIAL SALE; See Execution; Judgment; Mortgages and Deeds of Trust; Partition, 1; Sheriff's Sale.

JURISDICTION; See Crimes and Punishments, 2, 3; Equity, 2.

JURY; See Forcible Entry and Detainer.

JUSTICES' COURTS.

- 1. Practice, civil—Appeal from justice—Inserting names of members in lieu of firm name—Change in cause of action.—Where suit before a justice is brought in the name of a firm, the cause may be amended on appeal in the Circuit Court, by inserting the names, in full, of the members composing the firm. This is not the introduction of any new parties, and does not change the cause of action, within the meaning of the statute. (Wagn. Stat., 850, § 19.) [House vs. Duncan,—50 Mo., 453—commented on.]—Beattie vs. Hill, 72.
- Note lost after appeal from justice—Affidavit not required—Constr. Stat.—
 Where a note, sued upon before a justice of the peace is lost after appeal taken to the Circuit Court, the affidavit of loss, contemplated by the statute (2 Wagu, Stat., p. 81, § 10), is not required.—Hosea & Co. vs. Cross, 173.
- 3. Justices' courts, replevin in—Failure of statement to show cause of action—Amendment of statement in Circuit Court.—In a replevin suit brought before a justice of the peace under the "claim and delivery" act (Wagn. Stat., 817,) where the statement fails to allege that the property was detained by defend—Vol. IX.

JUSTICES' COURTS, continued.

ant, and that it had not been seized under any process, execution or attachment, etc., it shows no cause of action upon which process can issue; and such statement cannot be amended in the Circuit Court.—Gist vs. Loring, 487.

See Judgment, 1; Unlawful Detainer.

L

LAND AND LAND TITLES.

- Acknowledgment—Certificate, allegation of as to value.—Where a conveyance
 is acknowledged before an officer authorized to take the same within the limits of his jurisdiction, it will be presumed that the acknowledgment was actually taken within such limits, without an averment of that fact contained in
 the certificate,—Bradley vs. West, 33.
- 2. Land and land titles—Legal seizin follows legal title—Adverse possession, what necessary to overthrow—Statute of limitations.—Where one has the legal title, the legal seizin and possession follow; and any one setting up or claiming under an adverse possession, must show that he, or those under whom he claims, have had the open, notorious and continued adverse possession, under claim of right or color of title, for the period limited by the statute.—Id.
- 3. Land and land titles—Possession of part of a tract, with title to whole, possession of all—Ouster—Entry by claimant without legal title—Possession of, how restricted—Construction of statute.—Where the legal owner is in the actual possession of a part of the land of which he has the fee, the law invests him with the possession of the whole; and he can only be dispossessed by actual ouster; and one afterward entering on the land without the legal title, will be restricted in his possession to the part actually occupied or cultivated. The statute, (Wagn. Stat., 917, § 5) making the possession of part of a tract of land under a mere color of title, in certain cases, possession of the whole, applies only where there is no legal occupancy by the owner of any part.—Id.
- 4. Adverse possession—Proof of good faith, when not necessary.—In general it is sufficient that the possession of land be under claim of title, to clothe it with the character of an adverse holding, and to give it efficacy as a defense—when of sufficient duration to be a bar—without proof that the possession was taken in good faith. But there must be an intent to claim and possess the land.—Id.
- 5. Military bounty land—Entry upon, must be made when, etc.—Under a proper construction of the statute (Wagn. Stat., 915-16, §§ 1, 2) an entry upon military bounty land, to be valid and effectual must be made before the expiration of the time limited by § 1 that is, within two years after the taking of adverse possession; otherwise the right of action is gone, and whenever that right is barred, the right of entry is closed.—Id.
- 6. Land, contract for sale of—Title bond—Conveyance by obligor to third part—Rescission of original contract—Suit by obliges for purchase money, etc.—Where one takes possession of land under a bond given to him for conveyance thereof on payment of the purchase money, a deed by the owner to a third party in the meantime, does not of itself, regardless of the circumstances, amount to a rescission of the original contract so as to authorize the obligee to abandon the land and receive back whatever purchase money he has paid

LAND AND LAND TITLES, continued.

out; ex. g. where the grantee in the deed agreed to receive the purchase money and to give the obligee another bond, with like condition to convey on receipt of the money, and especially where the obligee himself agreed to the substitution, the latter cannot recover back money paid out for the land and improvements thereon. And most certainly such action will not lie where the obligor has the land re-deeded to himself, and then tenders the deed.—Cooper vs. Stockton, 81.

- 7. Entry upon fraction of quarter section—Conveyance of larger mub-division by disseizor with deed back to himself—Color of title.—The mere fact of an entry upon and occupation of a fractional sub-division of a section of land set apart under the United States surveys in Missouri, will not give color of title to a larger sub-division thereof, within the meaning of § 5 of the statute of limitations (Wagn. Stat., 917,) unless he has acquired title by paper conveyance or inheritance, or contract from another who has previously assumed to be owner. And the disseizor cannot, by a conveyance to a third person, of the larger tract, and taking a deed back to himself, obtain color of title thereto.
- Where one is said "to have color of title," the phrase implies that some act has been done, or some event has occurred by which some title, good or bad, has been conveyed to him.—Mylar vs. Hughes, 105.
- 8. Statute of limitations—Failure to take possession of land for twenty years—
 Ouster necessary to divest title.—One who has the title to land but fails to take
 actual possession of it for twenty years, is not for that reason barred by the
 statute of limitations. The title carries with it the seizin, and to divest it after
 any lapse of time, great or small, there must be an actual ouster or a constructive disseizin, by adverse possession of some part of the tract under color
 of title.—Id.
- Land—Occupancy of without claim or color of title a trespass.—The taking
 possession of land without any color of title or assertion of claim thereto, is
 a mere trespass.—Id.
- 10. Lands—Burning of records—Handbills as evidence.—Where all the records pertaining to the sale of land were destroyed by the burning of the county court house, hand-bills advertising the date of sale and description of the property, may be used as evidence in suit for the land.—Id.
- 11. Land—Patent—Decree as to—Good collaterally as against mere possession.—
 A decree divesting the title to land out of an original patentee, and vesting it in another, cannot be attacked collaterally on account of mere irregularities in the proceedings, by one not a party in interest, and having no claim to the property other than naked possession.—Id.
- 12. Mortgages—Ejectment against one holding under possession by—Notice of mortgage shown by fact of possession.—One holding possession under a mortgage cannot defend his possession in ejectment brought against him by a purchaser from the mortgager, after the execution of the mortgage, without notice thereof. And the possession of defendant and knowledge of that fact by plaintiff are not sufficient to charge the latter with notice of the mortgage. To produce that result, the instrument must be recorded, or plaintiff must have either actual notice of its existence, or information such as would put a man of ordinary prudence upon inquiry as to its existence. But the fact of such

- LAND AND LAND TITLES, continued.
 - possession may be taken into consideration by the jury, in connexion with other circumstances, as going to show actual notice to plaintiff of the mortgage.—Whitman vs. Taylor and Caldwell Co., 127.
- 13. Lands—Irregularities in judgment and execution affecting—Title of stranger thereto, not affected by.—Irregularities in the judgment and execution under which land is sold, cannot affect the title of one who is a stranger to those proceedings and has no notice of the irregularities at the time of his purchase.—Id.
- 14. Land, sale of, founded on constable's nulla bona return, made in less than ninety days.—A sale of land under execution, issued on a transcript from a justice's court, is not void, collaterally, by reason of the fact that the transcript was founded upon a constable's return, made in less than ninety days from date of the execution.—Id.
- Sheriff's sale not void collaterally for inadequacy of price.—Mere inadequacy
 of consideration will not, of itself, render a sheriff's sale void in a collateral
 proceeding.—Id.
- Equity—Jurisdiction—Dower—Fraud.—Courts of equity have jurisdiction
 of actions to set aside conveyances obtained by fraud, and to secure assignment of dower.—Devorse vs. Suider, 235.
- 17. Land and Land Titles—Deed obtained without knowledge of grantor—Assent presumed after knowledge of record and acquiescence in occupation by grantee.—Semble, that although the grantor in a deed does not actually deliver it to the grantee, yet if he is afterwards aware of its being recorded, and of occupation of the land by the grantee for a long period of years, his assent may be presumed.—Id.
- 18. Conveyances—Married wonan—Acknowledgment—Delivery.—The consent of a married woman to the delivery of a deed executed by her is evinced by her acknowledgment, which is the only way known to our law by which the consent of a femme covert can be exhibited.—Id.
- 19. Equity—Title to land in third party cannot be set up, when.—A. having a title bond for certain land, and having paid the purchase price, conveyed the same to B., but the deed was not recorded. B. sold the tract to C., and returned the deed to A. with directions to cancel it, and make a conveyance directly to C., and such deed was accordingly executed with full covenants and for adequate consideration. In a suit by C. for a specific performance of his contract by A., wherein B. asserted no claim, held, that parties having knowledge of the deed to plaintiff could not attack his title on the ground that A., by his title to B., had divested himself of title, and that the return of the instrument did not re-invest it in A.—Williams vs. McGuire, 254.
- 20. Acknowledgments—Form of, in conveyances of land partly owned by wife and partly by husband, what sufficient.—Lands owned by the husband and those owned by the wife in fee, may be embraced in the same conveyance; and under the Statute of 1855, the wife was not required to make two acknowledgments, one for her own lands, and one relinquishing her dower in the lands of her husband. Nor was it essential that a single acknowledgment should contain distinct references to the lands owned by the wife and those owned by the husband. A single acknowledgment would suffice. The clause

LAND AND LAND TITLES, continued.

relinquishing her dower will be held applicable to all lands in which she had dower, and surplusage as to all lands owned by her in fee.—Barker vs. Circle,

- 21. Deed by married woman having only equitable right—After-acquired title of
 —Ejectment brought under—Estoppel under former covenants—Claim of defendant for affirmative relief in such suit, etc.—A married woman bought and
 paid for, and entered upon and permanently improved, certain land, but took
 no deed therefor; subsequently, conjointly with her husband, she conveyed
 the same by deed of trust with covenants of warranty, and after sale and purchase under the trust deed, being at that time discovert, obtained from her
 vendor a quit-claim deed for the property.
- Held, that her covenants in the trust deed would not estop her from maintaining ejectment on or after acquired title, paramount to the right conveyed by her; but the legal title received by her from her vendor, the right to which she had previously acquired by her purchase and possession, was, in equity, in her hands, or in the hands of those having notice of her purchase and subsequent conveyance, subordinate to the right transferred by her deed of trust.
- Where suit in ejectment is so brought, although defendant might properly ask to have plaintiff's title vested in himself, yet his failure to do so would not impair his right to hold possession against plaintiff claiming under that title with notice of defendant's equity.—Id.
- 22. Limitations, statute of—Adverse possession, what necessary to defeat an action of ejectment.—Adverse possession in order to defeat an action of ejectment, must be, for ten years prior to the institution of the suit, an open, notorious and continuous occupancy of the land, or some part thereof, under color of title to the whole, and must be taken in good faith, under a claim adverse to plaintiff and those from whom he derives title.—Turner vs. Hall, 271.
- 23. Color of title, deeds relied on to show should be taken in good faith—Instructions as to color of title.—The question whether deeds relied on as color of title were taken in good faith is rightly submitted to the jury. And they should be particularly told what constitutes color of title.—Id.
- 24. Adverse possession—Acts to establish may be determined in part from character of the land—What sufficient.—In determining the question of adverse possession, the jury may take into consideration the nature and situation of the land. And the placing of deeds on record, passing over the tract, employment of agents living in the neighborhood to look after it and prevent trespasses upon it, payment of taxes continuously under claim of title, and the like, may be considered by them; and it is not always necessary to prove actual occupation by the claimant; but the acts referred to would not be sufficient of themselve to establish title by reason of adverse possession, unless the land was unsusceptible of more definite and actual possession, or such acts were known to the party holding the legal title, and known to have been done under claim of adverse title—Id
- 25. Adverse possession, constructive—Recent decisions as to.—The later decisions of this court manifest no disposition to multiply those evidences of adverse possession which tend to give it a constructive character.—Id.

LAND AND LAND TITLES continued.

- 26. Military bounty land—Right of action accrued before August 1st, 1866—Limitation, what statute governs.—One whose right of action for the recovery of military bounty land, accrued prior to the act of August 1st, 1866 (Wagn. Stat., 915, § 1), is not barred by two years of adverse possession thereafter. In such case, the ten years limitation act, and not that of two years, applies. (Wagn. Stat., 921, § 32.)—Neilson vs. County of Chariton, 386.
- Deed cannot give color of title to possession, when.—A deed can afford no color
 of title to support a possession ended long before it is made.—Cooper vs. Ord,
 420.
- 28. Land titles—Limitations, statute of—Possession—That of different holders—Tacking together of—Color of title, etc.—Subsequent adverse possession.—Where one takes possession under a deed giving color of title to certain land, his possession may be transferred to subsequent parties, and the possession of the different holders may be united so as to make up the statutory period—provided the possession be notorious, etc., and the claim thereby acquired will be good so far as the land actually in occupation is concerned. But such subsequent parties cannot hold other land merely by color of their first grantor's title, independent of any conveyance. And title so acquired by connected possessions may be defeated by subsequent adverse possession for the statutory period.—Id.
- 29. Lands and land titles—Extent of boundaries, how shown to constitute color of title.—It does not always require a written instrument to constitute color of title, but there must be some visible acts or indicia which are apparent to all, showing the extent of the boundaries of the land claimed, to amount to color of title.—Id.
- 30. Ejectment—Military bounty land—Color of title.—Where the right of action accrued under the present statute (Wagn, Stat., 915, § 1) two years of open notorious and adverse possession of military bounty land will defeat an action of ejectment—regardless of color of title—as to the land actually occupied by defendant.—Id.
- 31. Military bounty land.—Entry upon must be made, when.—An entry upon military bounty land, to be valid and effectual, must be made within two years after the taking of adverse possession. (Bradley vs. West, ante p. 33.)—Merchant's Bk. vs. Clavin, 559.

See Ejectment; Conveyances; Forcible entry and Detainer, 4, 5, 6; Railroads, 14, 16; Lis Pendens; Judgment, 5; Quieting Titles; Contract, 9. LANDLORD AND TENANT.

- Landlord and tenant—Emblements, sale of.—A tenant not indebted for rent, although owing his landlord on other scores, has a right to sell a crop of his own raising.—Brown v. Turner, 21.
- Action for waste by a tenant at will against a stranger,—A tenant at will or by sufferance is not liable to his landlord for waste committed by a stranger, and will have no action against the stranger therefor.—Coale vs. H. & St. J. R. R. Co., 227.

LANDLORD AND TENANT, continued.

- 2. Landlord and tenant—Cutting timber from wild lands, vested as part of farm What possession shown by.—Where lessees of a farm embracing wild lands, under the terms of their lease—authorizing them to cut timber from any part thereof—do in fact fell and remove timber from portions of the wild land, such acts are circumstances going to show possession of the whole tract.—The Merchants' Bk. of St. Louis vs. Clavin, 559.
- Landlord and tenant—Attornment to stranger.—A deed from a tenant to a
 third party, without the consent of the landlord, can have no effect in depriving the lessor of his possession.—Id.
- Landlord and tenant—Person holding under tenant—Adverse title.—One
 holding under a lessee cannot set up a title adverse to that of the original
 lessor.—Id.

See Forcible Entry and Detainer; Unlawful Detainer.

LEGISLATURE ; See Evidence, 1.

LICENSE; See Practice, Criminal, 2, 3.

LIEN; See Judgment, 6; Mechanics' Liens; Mortgages and Deeds of Trust, 6; Lis Pendens.

LIENS, JUDGMENT; See Judgment, 1.

LIEN, MECHANICS'; See Mechanics' Lien.

LIEN, VENDORS'; See Vendors' Lien.

LIMITATION.

- 1. Administration—Action against estate—Limitation as to claims.—The cause of action against an administrator for money, alleged to have been wrongfully collected by him on a note, accrues at the date of the payment thereof. And, the statutory limitation of two years against such claims, being then in force, failure to present the claim against the estate within two years from the time of payment, will bar it, notwithstanding that the administration may have been commenced when the three years' limitation act was in operation.—Greenabaum vs. Elliot, 25.
- 2. Land and land titles—Legal seizin follows legal title—Adverse possession, what necessary to overthrow—Statute of limitations.—Where one has the legal title, the legal seizin and possession follow; and any one setting up or claiming under an adverse possession, must show that he, or those under whom he claims, have had the open, notorious and continued adverse possession, under claim of right or color of title, for the period limited by the statute.—Bradley vs. West, 33.
- 3. Land and land titles—Possession of a part of a tract, with title to whole, possession of all—Ouster—Entry by claimant without legal title—Possession of, how restricted—Construction of statute.—Where the legal owner is in the actual possession of a part of the land of which he has the fee, the law invests him with the possession of the whole; and he can only be dispossessed by actual ouster; and one afterward entering on the land without the legal title, will be restricted in his possession to the part actually occupied or cultivated. The statute, (Wagn. Stat., 917, § 5) making the possession of part of a tract of land under a mere color of title, in certain cases, possession of the whole, applies only where there is no legal occupancy by the owner of any part.—Id.

LIMITATION, continued.

- 4. Adverse possession—Proof of good faith, when not necessary.—In general it is sufficient that the possession of land be under claim of title, to clothe it with the character of an adverse holding, and to give it efficiency as a defense—when of sufficient duration to be a bar—without proof that the possession was taken in good faith. But there must be an intent to claim and possess the land.—Id.
- 5. Partnership-Dissolution of-Partner trustee, how far-Collections by one member after dissolution-Statute of limitations, when begin to operate in ref. erence to accounts, etc .- 1. Partners inter sese are trustees as to firm property held by them after dissolution, but the trust is implied, not express. Hence, actions between them, relating thereto, are subject to the statute of limitations. 2. The statute does not necessarily begin to run from date of dissolution. Its operation commences with a breach of trust by the partner having partnership property or accounts in charge. And as a general rule the breach takes place after a failure to account and settle within a reasonable time after dissolution, and must be ascertained from the particular circumstances of each case. 3. Where an account has been stated between them at the close of the partnership, the statute, as to the items embraced therein, runs from the time of the statement. 4. Where mutual arrangement, after dissolution, delegates to one member the collection of debts due the firm, no cause of action accrues against him in favor of his co-partner, nor does the statute begin to run, so long as a faithful discharge of that duty postpones a final settlement .-- Coudrey vs. Gilliam, 86.
- 6. Statute of limitations—Defense of may be raised by demurrer, when—Motion in arrest.—The defense of the statute of limitations may be made by demurrer when the statement of the plaintiff shows an absolute bar without exception. But where this fact does not appear on the face of the petition the same may be exceedingly defective, and yet, defendant failing to demur, and setting up the statute as a defense—which is traversed by the replication—the defect is not subject to motion in arrest.—Id.
- 7. Entry upon fraction of quarter section—Conveyance of larger sub-division by disseizor with deed back to himself—Color of title.—The mere fact of an entry upon an occupation of a fractional sub-division of a section of land, set apart under the United States survey in Missouri, will not give color of title to a larger sub-division thereof, within the meaning of § 5 of the statute of limitations (Wagn. Stat., 917), unless he has acquired title by paper conveyance or inheritance, or contract from another who has previously assumed to be owner. And the disseizor cannot, by a conveyance to a third person, of the larger tract, and taking a deed back to himself, obtain color of title thereto.

Where one is said "to have color of title," the phrase implies that some act has been done, or some event has occurred by which some title, good or bad, has been conveyed to him.—Mylar vs. Hughes, 105.

8. Statute of limitations—Failure to take possession of land for twenty years—Onster necessary to divest title.—One who has the title to land but fails to take actual possession of it for twenty years, is not for that reason barred by the statute of limitations. The title carries with it the seizin, and to divest it after any lapse of time, great or small, there must be an actual ouster or a constructive disseizin, by adverse possession of some part of the tract under color of title.—Id.

LIMITATION, continued.

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- 9. Limitations, statute of—Adverse possession, what necessary to defeat an action of ejectment.—Adverse possession in order to defeat an action of ejectment, must be, for ten years prior to the institution of the suit, an open, notorious, and continuous occupany of the land, or some part thereof, under color of title to the whole, and must be taken in good faith, under a claim adverse to plaintiff and those from whom he derives title.—Turner vs. Hall, 271.
- 10. Color of title, deeds relied on to show should be taken in good faith—Instructions as to color of titls.—The question whether deeds relied on as color of title were taken in good faith is rightly submitted to the jury. And they should be particularly told what constitutes color of title.—Id.
- 11. Adverse possession—Acts to establish may be determined in part from character of the land—What sufficient.—In determining the question of adverse possession, the jury may take into consideration the nature and situation of the land. And the placing of deeds on record passing over the tract, employment of agents living in the neighborhood to look after it and prevent trespasses upon it, payment of taxes continuously under claim of title, and the like, may be considered by them; and it is not always necessary to prove actual occupation by the claimant; but the acts referred to would not be sufficient of themselves to establish title by reason of adverse possession, unless the land was unsusceptible of more definite and actual possession, or such acts were known to the party holding the legal title, and known to have been done under claim of adverse title.—Id.
- 12. Adverse possession, constructive—Recent decisions as to.—The later decisions of this court manifest no disposition to multiply those evidences of adverse possession which tend to give it a constructive character.—Id.
- 13. Military bounty land—Right of action accrued before August 1st, 1866—Limitation, what statute governs.—One whose right of action for the recovery of military bounty land, accrued prior to the act of August 1st, 1866 (Wagn. Stat. 915, § 1), is not barred by two years of adverse possession thereafter. In such case, the ten years limitation act, and not that of two years, applies. (Wagn. Stat., 921, § 32.)—Neilson vs. County of Chariton, 386.
- 14. Damages-Suit against railroad for—Suit after non-suit must be brought, when.

 —Under § 5 of the Damage act (Wagn. Stat., 520), the new suit brought against a railroad, after non-suit, must be commenced within one year after the date of the injury. Section 19 of the chapter concerning Limitations (Wagn. Stat. 919.) authorizing the commencement of a new action within a year from date of non-suit, has no application to causes, the time for bringing which is not "prescribed" by that chapter (§ 19), but otherwise limited. (Id., § 26.)—Gerren vs. H. & St. J. R. R. Co., 405.
- 15. Land titles—Limitations, statute of—Possession—That of different holders—Tacking together of—Color of title, etc.—Subsequent adverse possession.—Where one takes possession under a deed giving color of title to certain land, his possession may be transferred to subsequent parties, and the possession of the different holders may be united so as to make up the statutory period—provided the possession be notorious, etc., and the claim thereby acquired will be good so far as the land actually in occupation is concerned. But such subsequent parties cannot hold other land merely by color of their first grantor's

LIMITATION, continued.

title, independent of any conveyance. And title so acquired by connected possessions may be defeated by subsequent adverse possession for the statutory period.-Cooper vs. Ord, 420.

- 16. Lands and land titles-Extent of boundaries, how shown to constitute color of title .- It does not always require a written instrument to constitute color of title, but there must be some visible acts or indicia which are apparent to all. showing the extent of the boundaries of the land claimed, to amount to color
- 17. Ejectment-Military bounty land-Color of title. Where the right of action accrued under the present statute (Wagn. Stat. 915, 2 1) two years of open. notorious and adverse posession of military bounty land will defeat an action of ejectment-regardless of color of title-as to the land actually occupied by defendant.-Id.
- 18. State University-Annuity for-Statute of limitation-Fund, how affected by. -Under the act of March 11th, 1867 (Sess. Acts 1867, p. 9) a certain proportion of the State revenue was set aside annually for the support of the State University. In mandamus against the State Auditor to compel a payment of the annuity for the five years next preceding, held, that the claim was not barred by the limitation of two years contained in the statute, relating to the Treasury Department. (Wagn. Stat., 1336, § 24.) That annuity is not one of those adverse claims contemplated by the statute, requiring a presentation of "the evidence that proves or supports them," but a gratuitous fund set apart by the State, and the amount of which is peculiarly within the knowledge of the State Auditor .- State ex rel. vs. Halliday, State Auditor, 596.

LIQUOR, SELLING OF; See Practice, criminal, 2, 3. LIS PENDENS.

- 1. Equitable liens-Filing notice of lis pendens affects purchaser of land .- The purchaser of land, after the filing of notice of a lawsuit affecting the title thereof, acquires only the rights of a purchaser pendente lite. Under a proper construction of the statute (W. S., 905), the words "purchasers of incumbrances" should read "purchasers or incumbrancers."-Turner vs. Babb, 342.
- 2. Lis pendens-Purchaser of property, when affected by decree, etc .- A purchaser pendente lite of property actually in litigation, though for a valuable consideration and without notice, express or implied in point of fact, will be bound by the decree affecting that property, which may be made against the person from whom he derives title .- Id.
- 3. Lis pendens-Purchaser with notice affected although relief granted is not prayed for .- A. brought suit to divest the title to a tract of land out of B. & C., and to vest the same in himself; but the decree of court vested the title in B., at the same time, however, giving judgment for a certain sum, and ordering a special execution against the land to satisfy it. Held, that a purchaser at the sheriff's sale would hold the title as against a grantee of B. with statutory notice of the litigation. The fact that the decree placed a lien, not asked for by plaintiff, on the land, did not invest B. and his grantee with the title discharged of the incumbrance. In such case, the grantee, pendente lite is governed by the decree of the court notwithstanding that the relief granted is the result of compromise, and other than that called for by the pleadings.-Id.

LOST NOTE; See Justice's Courts, 2.

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MARRIED WOMEN; See Husband and Wife; Land and Land Titles, 16, 18, 20, 21.

MASTER AND SERVANT; See Railroads, 21, 22.

MECHANIC'S LIEN.

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- Mechanic's lien—Public school houses not subject to.—A school house and lot, the
 title to which is vested in the State Board of Education, is not subject to a
 mechanic's lien. (Wagn. Stat., 907.)—Abercrombie vs. Ely, et al., 23.
- 2. Mechanic's lien—Attaches only to structure in which material was actually used—
 Statute and cases construed.—The present mechanic's lien law gives the material
 man a lien only on the building, into the construction of which the material
 actually entered. The words, "with intent to defraud the person from whom the
 materials were purchased," etc., used in § 23 of the mechanic's lien law (Wagn
 Stat., 912); must be construed to mean "with intent to deprive him of the lien
 on which he relied at the time of making the sales." Morrison v. Hancock,
 40 Mo. 561 and Hoffman v. Walton, were cases construing the act of 1857
 (Sess. Acts 1857, p. 668) before the present modification of the law governing
 mechanics' liens.—Garth vs. Carrier, 581.

MILITARY BOUNTY LAND; See Conveyances, 3; Land and Land Titles, 5, 26, 30, 31.

MISDEMEANOR; See Crimes and Punishments, 2, 3.

MORTGAGES AND DEEDS OF TRUST.

- 1. Notes secured by deed of trust—Provision that neither note shall be collected till last one fall due—Suit on notes, how affected by.—Where a deed of trust given to secure sundry notes maturing at different dates, provides that none of them shall become due and that the deed shall not be foreclosed, till the maturity of the note made latest payable, the holder who purchases one of the notes with knowledge of the above provision, cannot recover judgment thereon until the last note matures. In such suit the note in action and the deed of trust may be read together and considered as one instrument.
- (As to how far the deed qualified the time of payment of the note, the action not being a proceeding to foreclose the deed, Hough, J., expressed no opinion.)—Brownlee vs. Arnold, 79.
- 2. Mortgagee—Ejectment against one holding under possession by—Notice of mortgage shown by fact of possession.—One holding possession under a mortgagee cannot defend his possession in ejectment brought against him by a purchaser from the mortgagor, after the execution of the mortgage, without notice thereof. And the possession of defendant and knowledge of that fact by plaintiff are not sufficient to charge the latter with notice of the mortgage. To produce that result, the instrument must be recorded, or plaintiff must have either actual notice of its existence, or information such as would put a man of ordinary prudence upon inquiry as to its existence. But the fact of such possession may be taken into consideration by the jury in connexion with other circumstances, as going to show actual notice to plaintiff of the mortgage.—Whitman vs. Taylor, et al., 127.
- Mortgagee—Purchase from—Subrogation of purchaser to rights of mortgage.—
 [The court intimated that where land is purchased of a mortgagee, and the

MORTGAGES AND DEEDS OF TRUST, continued,

money is used to cancel the mortgage debt, the purchaser might, in a proper proceeding, be subrogated to the rights of the mortgagee, for re-imbursement of the money so advanced.]—Id.

- 4. Morigage on mill, when will include machinery subsequently placed in.—By the terms of a mortgage given on a mill to secure certain notes, it was made "a lien on the mill and machinery in said mill till the payment of said notes," Held, that it would embrace machinery placed in the building after the mortgage was given and before the notes were satisfied.—Johnston vs. Morrow, 339.
- 5. Trustee's deed under deed of trust—Recitals in, not prima facie evidence, when.—The recitals contained in a deed given by a trustee acting under a deed of trust are not prima facie evidence of the truth of those recitals, unless declared to be so by the terms of the deed of trust.—Neilson vs. Chariton Co., SSA.
- 6. Mortgage—Agreement to give will create a lien, how far.—It seems to be well settled, that an agreement in writing to give a mortgage, will create a lien upon the land specified in the agreement as against general creditors. (McQuie vs. Peay, 58 Mo., 58; Blackburn vs. Tweedie, post p. 505.) And it is proper to record such an instrument.—Carter vs. Holman, 498.
- 7. Equitable mortgage on land—Agreement by owner to give occupancy of land in lieu of interest on sum borrowed.—A written agreement by the owner to pay the occupant of certain land a given sum, conditioned, that when the land was sold to enable the owner to realize the amount, the occupant should surrender his possession, and meantime giving him the occupancy in lieu of paying him interest on this sum, was held to constitute an equitable mortgage, and amounted to a specific lieu on the land; and any one buying with notice of the agreement would take subject to it.—Blackburn vs. Tweedie, 505.
- 8. Agreement will constitute equitable mortgage, when.—An agreement to give a mortgage, a mortgage defectively executed, or an imperfect attempt to create a mortgage or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity or a specific lien on the property so mortgaged. (See McQuie vs. Peny, 58 Mo., 58-9; Carter v. Holman, ante p. 498.)—Id.
- 9. Suit to foreclose deed of trust—Prior foreclosure—Judgment on note, notwithalanding.—Although, in suit to foreclose a deed of trust given to secure a note, it appear that the deed has already been foreclosed, and the property sold, yet plaintiff may nevertheless obtain a general judgment on the note, if the same be unsatisfied.—Watson vs. Hawkins, 550.
- 10. Mortgage—Transfer of lands not an assignment of debt.—The assignment of a debt secured by mortgage, passes the mortgage as incident thereto; but the transfer of the mortgaged land does not per se operate an assignment of the deed and of the debt therein secured.—Id.

See Swamp Lands, 1.

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NEGLIGENCE; See Bills and Notes, 9, 12; Common Carriers, 1, 2, 3, 4, 5; Damages, 4, 6, 7; Railroads, 3, 4, 5, 6, 18, 21, 22, 23, 24, 26, 27, 28.

NODAWAY COUNTY; See Execution, 7.

NON-SUIT; See Practice, civil, 1; Practice, civil, Appeal, 2.

NOTICE; See Lis Pendens.

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OFFICER; See Corporations, Municipal, 1, 6; Limitations, 18; Revenue, 2.

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PARTITION.

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1. Partition—Sale of land in partition—Confirmation of discretionary with lower court.—The confirmation or rejection of a sale of land in partition, is a matter resting largely in the discretion of the lower court, and the Supreme Court will be very slow to interfere with its action.—Pomeroy vs. Allen, 530 PARTNERSHIP; See Limitations, 5; Practice, civil, Pleadings, 5.

PATENT; See Land and Land Titles, 11.

POSSESSION; See Forcible Entry and Detainer, 2, 3, 4, 5; Land and Land Titles, 27, 28; Landlord and Tenant, 3, 4, 5; Limitations, 2, 3, 4; Quieting Titles.

PRACTICE, CIVIL.

1. Practice, civil—Non-suit not voluntary where party may obtain judgment and substantial damages.—Where plaintiff is not precluded by the action of the court, in excluding testimony or otherwise, from recovering judgment and also substantial damages—if warranted by proof—non-suit taken by him will be held as voluntary and leaving him without remedy. And it is immaterial that in some particular the rulings made and instructions given may have been objectionable.—Loring vs. Cooke, 564.

See Practice, civil, Appeal, 3; Venue, 1.

PRACTICE, CIVIL, ACTIONS; See Attachment; Bond, 1; Contracts, 1; Ejectment, 1; Forcible Entry and Detainer; Landlord and Tenant, 2; Practice, civil, Parties, 4; Quieting Titles; Replevin; Revenue, 2; Slander; Streets, 5.

PRACTICE, CIVIL, APPEAL.

- Practice, civil—Judgment for costs—Appeal.—A judgment for costs is not a final judgment from which appeal will lie.—Conn vs. Ferree, 17.
- Equity—Non-suit with leave, etc.—Appeal.—Whether in suit in equity, a non-suit with leave to move to set aside can be taken so as to bring the case before the Supreme Court for review, doubted.—Id.
- 3. Certiorari only brings up the record—Facts dehors should be proved.—The effect of the writ of certiorari is merely to bring up the records and proceedings of the lower court. And, so, where a petition for that writ charged facts dehors the record, showing the illegality of a certain county tax, on a hearing of the cause, those material to the case should be proved or admitted as in other trials; otherwise the writ should be dismissed.—Rogers vs. Clinton Co. Court, 101.

PRACTICE, CIVIL, APPEAL, continued.

- 4. Judgment notwithstanding answer—Bill of exceptions need not contain motion for—Judgment may appear in transcript in ordinary form.—Where judgment is given notwithstanding the answer, the action of the court may be reviewed, although the judgment is in the usual form and silent touching the answer, and although the motion for judgment is not embraced in the bill of exceptions. (The motion may have been ore tenus.)—McDonald vs. Fist, 172.
- 5. Note lost after appeal from justice—Affidavit not required—Constr. Stat.—Where a note sued upon before a justice of the peace is lost after appeal taken to the Circuit Court, the affidavit of loss contemplated by the statute (2 Wagn. Stat., p. 814, § 10), is not required.—Hosea & Co. vs. Cross, 173.

See Administration, 5; Justice's Court, 3; Practice, civil, Parties, 1; Practice, Supreme Court; Unlawful Detainer.

PRACTICE, CIVIL, NEW TRIALS.

Newly discovered evidence, merely cumulative, no ground for new trial.—A motion for new trial should not be granted on the ground of newly discovered evidence which is merely cumulative.—Whalen vs. St. L., K. C. & N. R. W., \$23.

PRACTICE, CIVIL, PARTIES.

- 1. Practice, civil—Appeal from justice—Inserting names of members in lieu of firm name—Change in cause of action.—Where suit before a justice is brought in the name of a firm, the cause may be amended on appeal in the Circuit Court, by inserting the names, in full, of the members composing the firm. This is not the introduction of any new parties, and does not change the cause of action, within the meaning of the statute. (Wagn. Stat., 850, § 19.) [House vs. Duncan,—50 Mo. 453—commented on.]—McAllen vs. Woodcock, 174.—Beattie v. Hill, 72.
- 2. Practice, civil—Joinder of co-plaintiff against his consent—When proper.—
 In suit against a corporation, where a trustee was made co-plainiff without his knowledge and against his consent, and prayed a dismissal as to himself on that ground: Held, that although he might have been joined as co-defendant, yet it was not error in the court to overrule the motion, and retain him as plaintiff, on the execution of his co-plaintiff of a bond to indemnify him against costs.—McAllen v. Woodcock, 174.
- Bond—Action upon—All obligees must join.—Where an obligation is executed to two or more jointly, all the obligees must sue upon it. They cannot separate the liability and bring an action in favor of each.—Dewey v. Carey, 224.
- Assumpsit—Promise made for third party.—A promise made for his benefit
 may be sued upon by a third person.—Schuster vs. K. C., St. J. & C. B. R. R., 290.
 PRACTICE, CIVIL, PLEADING.
- Practice, civil—Pleadings, onus probandi.—Where the answer specifically denies the allegations of the petition, the burden is on plaintiff to prove them and the fact that defendant sets up certain equities as an independent defense does not shift the onus on defendant as to those allegations.—Sturdevant vs. Rehard, 152.
- Practice, civil—Withdrawal of a defense pleaded.—The right of a defendant to
 withraw one of his defenses at any time is unquestionable.—Elliott vs. Secor
 and Evans, 163.

PRACTICE, CIVIL, PLEADING, continued.

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I.

- 8. Practice, civil-Allegation as to existing of corporation-What sufficient.—In suit by a corporation, an averagent that plaintiff was a corporation "duly incorporated under by virtue of an act of the General Assembly of the State of Missouri entitled," etc., was a sufficient allegation of plaintiff's corporate existence.

 —The Chillicothe Savings Assoc'n vs. Ruegger, 218.
- 4. Pleadings—Allegations as to corporate existence in suit by company on contract, etc.—One having made a contract with a company, in its corporate name thereby admits that it is duly constituted a body politic and corporate, at the time, and is estopped from setting up for defense by way of demurrer or otherwise, the non-allegation of these facts by the company in suit on the contract, And in such suit the company need not state where it has its residence or principal place of business.—The Nat. Ins. Co. vs. Bowman, 252.
- 5. Promissory note given by partners—Allegation as to partnership, what sufficient.—In suit on a promissory note given by co-partners, the allegation that the makers were co-partners and signed their names as such, is sufficient without the further allegation that they were co-partners for business purposes or were known as such.—Id.
- 6. Practice, civil—Demurrer by one defendant—Judgment for both, when improper.
 —Where one of two defendants demurs to plaintiff's petition, and the demurrer being sustained, plaintiff refuses to answer, it is error to give judgment against him in favor of both defendants.—Id.
- The mere averment that the pleader "does not know" whether a certain state of facts exists, without more, is an insufficient denial under the practice act. (Wagn. Stat., 1015, § 12.)—Watson vs. Hawkins, 550.
- 8. Practice act—Replication—Latitude of denial allowed in.—Under the statute, (Wagn. Stat., 1017, § 15) it would seem that plaintiff in his replication is not allowed that latitude of indirect denial which is permitted to the defendant.—

 Id.
 - See Administration, 7; Arbitration and Reference; Attachment, 1; Bills and Notes, 5, 6; Common Carriers, 4; Contract, 8; Damages, 10; Equity, 5; Insurance, Fire, 4; Land and Land Titles, 11; Limitations, 6; Railroads, 21; Slander, 1.

PRACTICE, CIVIL, TRIALS.

- 1. Practice, civil—Instructions—Failure to give additional ones no ground of reversal, when.—Where instructions given, correctly explain the law and cover all the issues in the case, the refusal of additional instructions cannot be assigned for error.—Bradley vs. West, 59.
- 2. Practice, civil—Instructions—May declare that certain evidence tends to prove particular facts.—An instruction which tells the jury that they may consider certain evidence as tending to prove a particular fact, but which makes no comment as to its weight or effect, is not for that reason improper.—Beattie vs. Hill. 72.
- Evidence—Execution of insurance policy—What testimony sufficient to give
 question as to, to jury—Proof heard by court in absence of jury.—In suit on
 a policy of insurance, where the defendant pleads non est factum, any evidence

PRACTICE, CIVIL, TRIALS, continued.

tending to show the execution of the instrument, even though contradicted will be sufficient to give the paper to the jury, who are then to determine what weight shall be attached to the testimony. As to the right of the court to pass upon testimony touching the execution of a paper, a distinction may be drawn between a document whose execution is the main issue being tried, and one the execution of which is preliminary or collateral to the main controversy. In the former case it is a mere usurpation of the province of the jury, and a practice totally unauthorized, for the court to withdraw the panel and proceed of its own motion to hear testimony touching the execution of the instrument—Grady vs. Am. Cent. Ins. Co., 116.

- Practice, civil—Instructions—When refusal of proper.—It is not error to refuse an instruction, when those given fairly present the law of the case and are not calculated to mislead.—Wilson vs. K. C., St. J. & C. B. R. R., 184.
- Practice, civil—Instructions.—Instructions not based on evidence are properly refused.—Read vs. St. Louis, K. C. & N. R. R., 199.
- Instructions calculated to confuse, etc.—Instructions substantially given in another form, and those calculated to confuse or mislead, are properly rejected.—Coale vs. H. & St. J. R. R., 227.
- Practice, civil—Instructions—Misleading—Refusal of.—Instructions not based on testimony and calculated to mislead the jury, should be refused.—Lester vs. K. C., St. J. & C. B. R. R. Co., 265.
- 8. Instructions—Rejection of particular ones improper, when the aggregate states the law properly.—If instructions taken as a whole declare the law properly, and are neither inconsistent nor misleading, the fact that any particular one is partial or defective, is no ground for its rejection.—Whalen vs. St. Louis, K. C & N. R. R. Co., 323.
- Instructions of little value, when.—Where a case is heard by the court as a
 jury, instructions are of but little use except to show the theory upon which
 the case is tried.—Cooper vs. Ord, 420.
- Instructions—Evidence—Refusal.—An instruction not supported by evidence should be refused.—Id.
- Instructions-Refusal of, proper, when.—Declarations of law not applicable to the facts of a case, although abstractly correct, are properly refused.—Gist vs. Loring, 487.
- Practice, civil—Witnesses—Credibility of, etc.—The trial court is the proper judge of the credibility of witnesses—Id.
- Practice, civil—Instructions.—Instructions not warranted by the evidence should be refused.—Sumner vs. McCray, 493.
- 14. Practice, civil—Allegata and probata-Claim for conversion of note, and proof of failure to pay pro rata proceeds, etc.—Under a petition charging the trover and conversion of a note, plaintiff cannot show that defendant was trustee appointed to collect the note and distribute the proceeds among the creditors of the maker, and failed to pay over to plaintiff his proportion of the amount. Eusworth vs. Barton, 511.
- Practice, civil—Conflict of evidence—Jury.—In civil actions at law, the finding of the jury on questions of conflicting evidence is conclusive.—Powell vs. Camp, 569.

PRACTICE, CIVIL, TRIALS, continued.

16. Instructions, may be refused, when.—It is no error to refuse an instruction when the same proposition of law is embraced in others already given.—Id.

17. Practice, civil—Instructions may be given, when, taken as a whole, they state the law properly.—Where instructions, taken together, state the law correctly, it is proper to give them, although they are objectionable when taken separately.—Edwards vs. Cary, 572.

See Arbitration and Reference; Damages, 10; Practice, civil, New Trials. PRACTICE, CRIMINAL.

1. Recognizance to appear—Demurrer—Omission of day of the month.—The condition of a recognizance was, that the principal should "appear at the Circuit Court on the first day of the next term thereof, to be holden on the—day of June next." On scire facias on the recognizance against the sureties, held, that the omission of the day of the month was not a material defect; and that even if there were any substantial defect in the recognizance, it could not be taken advantage of by demurrer; for a demurrer to a scire facias on a forfeited recognizance is not taken as to what appears in the writ or recognizance, but as to what appears of record.—State vs. Potts, 368.

 Practice, criminal—Indictment—Selling liquor without license—Burden of proof.—In indictments for selling liquor without license, the onus is on the accused of showing authority to sell.—State vs. Edwards, 490.

8. Selling liquor without license—Indictment for—Joinder, improper, when—No ground for reversal, when.—Persons may be jointly indicted for selling liquor without license, but there should be no joinder in the absence of proof showing a common design or concert of action. Where, however, notwithstanding the failure of such proof, it appears clearly that each of a number of defendants so jointly indicted are guilty of acts which would warrant a separate indictment and conviction, the misjoinder does not work such "prejudice to the substantial rights of defendant upon the merits" (Wagn. Stat., p. 1091, § 27,) as to warrant the interference of the Supreme Court.—Id.

See Crimes and Punishment

PRACTICE, SUPREME COURT.

 Practice, civil—Weight of evidence.—It is not the province of the Supreme Court to weigh testimony in civil actions at law.—Beattie vs. Hill, 72.

Practice, Supreme Court—Conflict of evidence.—In civil actions at law Supreme Court will not consider questions of conflicting evidence.—Schuster vs. K. C., St. J. & C. B. R. R., 290.

Practice, Supreme Court—Filing of brief, etc.—Where plaintiff in error fails
to file statement and brief, as required by statute, the writ will be dismissed.

—State vs. Smith, 515.

 Practice, Supreme Court—Evidence, weight of.—In civil actions at law, the Supreme Court has nothing to do with the weight of evidence.—Edwards vs-Cary, 572.

See Damages, 8, 11; Judgment, 2, 4; Partition, 1; Practice, civil, Appeal. PRINCIPAL AND AGENT; See Agency.

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Q.

QUIETING TITLES.

 Quieting titles—Statute as to, does not contempate future unterests.—Under the statute touching the quieting of titles (Wagn. Stat., 1022, 22 53, 54), plaintiff cannot compel defendant to litigate his claim to a future interest in an estate, which does not conflict with the possession or right of possession of plaintiff.—Webb vs. Donaldson and Farris, 394.

R.

RAILROAD.

- 1. Revenue, railroad—Hann. & St. Jo. R. R.—Sworn statement of president, assessment on basis of—Act of 1852 providing such basis of taxation not a contract with State—Assessment by Board of Equalization constitutional.—Under § 3 of the act of Sept. 20th, 1852, it became the duty of the president of the Hannibal & St. Joseph R. R. Co. to furnish an annual statement under oath to the State auditor, showing the actual value of the railroad property, from which statement that officer shall assess the railroad State tax: Held that this provision did not amount to a contract between the State and company which rendered invalid the act of March 10th, 1871, (Sess. Acts 1871, p. 56.) subjecting the road to assessment for taxation by a special board of equalization; and the latter act, so far as inconsistent with the former, repealed it.—State vs. Han. & St. Jo. R. R. Co., 143.
- 2. Damages—Personal injuries by railroad to servant, caused by defective track—Duty of company to keep track safe—In suit against a railroad company by an employee, for personal injuries caused by defective track, an instruction declaring defendants exempt from liability, notwithstanding its unsafe condition, if plaintiff knew, or could by the exercise of ordinary diligence have known, of the state of the track, is properly refused. It is not the business of the servant to ascertain whether the machinery and structure of the road are defective; but the duty of the company is to keep them in safe condition; and it is responsible for injuries resulting from such defect.—Porter vs. Han. & St. Jo. R. R. Co., 160.
- 8. Railroads—Killing of stock caused by failure to fence—Question of negligence.—Where the petition charges that the killing of stock by a railroad company was caused by its failure to fence its road at a point where it was required to fence, and where the accident occurred (Wagn. Stat., 310, § 43) the question of negligence cannot be raised.—Cary vs. St. L., K. C. & N. R. R. Co., 209.
- 4. Railroads—Failure to fence track—Killing of stock along uninclosed lands, not shown to be prairie land as well.—The failure of a railroad to fence its track through uninclosed land will not make it amenable for killing stock at that point unless the land was shown to be prairie land.—Id.
- 5. Railroads—Patent smoke stacks—Fires communicated by particular engine—
 Proof as to fires caught from other locomotives.—In suit against arailroad company for damage caused by the escape of sparks from a locomotive,
 testimony offered to prove the insufficiency of the engine or the negligence of
 the engineer by showing that fire had escaped from other locomotives of a
 similar pattern was rejected as collateral and incompetent.—Coale vs. Han. &
 St. Jo. R. R. Co., 227.

- 6. Damage—Destruction of property by fire escaping from locomotive—Presumption of negligence.—The settled law of this State is that proof of the destruction of property, by fire escaping from a locomotive, raises a prima facie case of negligence, which defendant must rebut by proof showing absence of negligence. Whether this is done is a question for the jury.—Id.
- 7. Railroads—Escape of cinders.—In suit against a railroad for damages alleged to have been caused by sparks escaping from a locomotive, it is error—after evidence, by a defendant, of a proper equipment and careful management of the engine causing the fire—to permit proof, in rebuttal, of other fires produced by sparks escaping from defendant's engine. The sufficiency of the equipment and management of the engine occasioning the fire, is the only matter then in issue. (Coale vs. Hann. & St. Jo. R. R. Co., ante p. 227.)—Lester vs. K. C., St. Jo. & C. B. R. R. Co., 265.
- 8. Damages—Railroads—Escape of fire from locomotive—Variance—Amendment.—Where the petition charges a railroad company with carelessly permitting fire to escape from its locomotive, proof that fire was thrown out, would amount only to a variance, which, at most, would require an amendment of plaintiff's petition. (Wagn. Stat., 1033, § 1.)—Id.
- 9. Railroad—Deductions from pay rolls of workmen of amounts due merchant for supplies—Implied assumpsit.—A railroad company having become liable to pay the wages of workmen employed by contractors (Wagn. Stat., 302, § 10) deducted, on their pay rolls, charges for sundry goods theretofore furnished the men by a merchant under an agreement entered into by him with the contractors. On the rolls, and pursuant to the agreement, the amounts purchased were entered as payments made on the wages account and as due from the contractors to the merchant; Held, that, being a stranger to the agreement, the company was not liable to the merchant under it for such advances; and its deductions of the amounts due the merchant from the wages of the men would not, of itself, raise an assumpsit in his favor against it. And it would be liable, notwithstanding, to the employees for the unpaid balances. But they having acquiesced in that mode of settlement, the merchant could recover those sums from the company on an implied undertaking to pay the same.—Schuster vs. Kas. City, St. Jo. & Council Bluffs R. R. Co., 290.
- 10. Damages—Injuries by railroad train—Contributory negligence—Causes, remote and immediate.—Although one injured by a railroad train was guilty of some negligence which contributed to the injury, yet if those in charge of the train might have avoided the injury by the exercise of ordinary care and prudence, the company would be liable, provided that the negligence of the one injured was the remote or incidental, and that of the road the direct, cause of the accident.—Whalen vs. St. L., K. C. & N. Rly. Co., 323.
- 11. Damages by railroad to person—Loss of limb—Measure of damages, etc.—In assessing damages for loss of limb caused by a railroad, the jury should consider the age, situation, bodily suffering and mental anguish of the person injured, and the loss sustained by him in consequence, and the extent to which he was thereby disabled from self-support.—Id.
- 12. Personal injuries by railroad—Negligence—Intoxication.—One standing in a state of intoxication, on a railroad track at the usual time of running of the train, and in a position of exposure, is guilty of negligence.—Id.



13. Railroads—Crossing used by passengers—Diligence of company and passengers—What necessary.—Where a railroad track is crossed by a path commonly used by passengers, trains should use great diligence to guard against accident; and a like diligence and caution devolves upon passengers.—Id.

14. Railroad—Location on land not ceded—License for—Road not trespasser, when
—Where a railroad is located on land other than that granted, but with the
knowledge of the owner who makes no objection, but declares his intention to
claim damages, the company cannot be held as a trespasser or wrong doer.—
Hosher vs. K. C., St. Jo. & C. B. R. R. Co., 329.

15. Railroads—Damages caused by surface water—By diversion of watercourse—Rule as to company's liabilety.—Where damages caused by the construction of a railroad, result from the flooding of surface water, and not the diversion of a natural stream or water course, the company will not be liable, if, in such construction, the company is reasonably prudent and careful to avoid injury. (Munkers vs. Kansas City, St. Jo. & Council Bluffs R. R. Co., post p. 334.)—Id.

16. Railroads—Relinquishment of right of way to road "along section line," meaning of.—Under an agreement relinquishing to a railroad company a right of way one hundred feet wide, over a tract of land situated in two sections of a township, the railroad was to be located "on the section line." Held, that the company would not forfeit its right to the land, because its track was not laid immediately on and along the section line, provided that it was constructed within the limits of the one hundred feet, and that this strip embraced that line.—Munkers vs. K. C., St. Jo. & C. B. R. R. Co., 334.

17. Pleadings—Damages caused by diversion of stream; by surface water—Variance.—Where plaintiff charges that his land was flooded and damaged by the diversion, by a railroad company, of a stream of water from its natural channel, he cannot recover, on proof showing that the injuries were caused solely by surface water. And the distinction between the cases and the relative liability of the company should be explained to the jury under appropriate instructions.—Id.

18. Damages—Liability of railroads for stock killed on unfenced track in unincorporated towns.—A railroad company will not be liable, without proof of negligence, for the killing of stock along the line of its road where it passes through a town which has been properly platted and recorded and laid out into lots and blocks, and streets crossing the track, which have been dedicated as public highways, notwithstanding that the road, at the point of the disaster, is unfenced. And it would make no difference in such case whether the town is incorporated or not. But the rule would be otherwise where the town exists only on paper and has no streets which are opened or used.—Gerren vs. Han. & St. Jo. R. R. Co., 405.

19. Damages—Suit against railroad for—Suit after non-suit must be brought when.—Under § 5 of the Damage act (Wagn. Stat., 520), the new suit brought against a railroad, after non-suit, must be commenced within one year after the date of the injury. Section 19 of the chapter concerning Limitations (Wagn. Stat., 919), authorizing the commencement of a new action within a year from date of non-suit, has no application to causes, the time for bringing which is not "prescribed" by that chapter (§ 19), but otherwise limited. (Id. § 26.)—Id.

- 20. Railroads—Damages—Stock killed—Uninclosed prairie land.—The failure of a railroad corporation to fence its track will render it liable in damages for injuries to stock along the line of its road, without proof of negligence, where the evidence shows that the land at the point of the casualty was uninclosed and also prairie land. (Cary vs. St. L., K. C. & N. R. R., ante p. 209.)—Shelton vs. St. L., K. C. & N R. R. Co., 412.
- 21. Master and servant—Master liable for tortious acts of servant in line of his employment—Averments as to.—The rule is firmly established that the master is civilly liable for the tortious acts of his servants whether of omission or commission, and whether negligent, fraudulent or deceitful, when done in the course of his employment, even though the master did not authorize or know of such acts, or may have disapproved of or forbidden them. (Garretzen vs. Duenckel, 50 Mo., 104.) But the act must be done not only while the servant is engaged in the service he is employed to render, but it must pertain to the particular duties of that employment, and this fact must be made to appear from the plaintiff's petition. And a general averment that the acts of the servant were in the range of his employment is a conclusion of law and not sufficient.—Snyder vs. Han. & St. Jo. R. R. Co., 413.
- 22. Railroad—Damage to child injured while getting on car after invitation of employee—Liability of company.—A railroad company will not be held liable for injuries received by a child while attempting to get upon one of its cars, in consequence of an invitation from one of its servants in charge of the car, where the evidence shows no authority on the part of the servant to permit persons to ride on the car, and it does not appear that the invitation or permission were in furtherance of the interests of the road, or connected in any manner with the service which the servant was employed to render.—Id.
- 23. Railroads—When responsible for killing of person notwithstanding his contributory negligence.—Although one may be improperly or unlawfully on the track of a railroad, that fact will not discharge the company or its employees, from the observance of due care, and where he is run over by the train and killed, the company will be responsible if its officers could have avoided the accident by the exercise of ordinary caution and watchfulness.—Isabel vs. Han. & St. Jo. R. R. Co., 475.
- 24. Railroads—Negligence—Degree necessary to charge company in case of infant.—Proof of a less degree of negligence will be necessary in order to charge a railroad company for injuries in case of an infant than in that of an adult. —Id.
- Railroad private property—Right to pass upon.—A railroad track is private
 property and except at highway crossings, persons have no right to pass
 upon it.—Id.
- 26. Trains—Diligence in running—In town—Over crossings.—The same diligence is not imposed on the officers of a train in running it through the country at large, as in the streets of a town, or the crossings of a public highway.—Id.
- 27. Railroads—Running over child—Care necessary to be exercised by company—Proximate cause.—In suit for damages against a railroad company for running over a child which had strayed upon the track, it appeared that the child was seen by the officers in time to avoid the collision, but mistaken for something else; and that by the exercise of a proper degree of care and

caution, they might, after first observing the object have discovered that it was a child in time to stop the train before the accident occurred. *Held*, that in such case, although some negligence might have been attributable to those having charge of the infant, it was not the proximate cause of the casualty, and the company would be liable.—Id.

- 26. Railroads—Statutory requirement as to fencing—Failure to fence may be shown in case of killing of child, when.—Where the road bed of a railroad is laid near to a dwelling-house, and the child of the owner gets upon the track and is killed by the train, plaintiff may show, as an element of negligence on the part of the company, a failure to fence its track as required by the statute even though the primary object of the requirement was merely protection of cattle and other stock.—Id.
- 29. Railroads—Failure to transport passenger to old depot—Knowledge of change by passenger—Contract held to be made in reference to change, when.—In suit against a railroad company for failing to carry plaintiff to its original depot, where it appeared that the company had abandoned its old depot for one, half a mile short of that terminus: Held, 1st. That although the change had been adopted only a few weeks prior to his purchase of ticket, yet, the running of the trains having been uniformly to the new depot since that change, will be considered as a usage of the company, in reference to which plaintiff must be held to have contracted. That a fortiori, such is the case where plaintiff knew of the change at the time of procuring his ticket; 2nd. That the question whether defendant had violated statutory requirements could not be raised in such a suit.—Martindale vs. K. C., St. Jo. & C. B. R. R., 508.
- 30. Corporation, illegal act of—When may be investigated by private citizen, collaterally.—The only exception to the rule which prohibits collateral inquiry by a private citizen into the supposed illegal acts of a corporation, is where such investigation is expressly authorized by the legislature.—Id.
- 31. Railroad tax—Charter of Han. & St. Jo. R. R.—Act of Sept., 1852, not an irrepealable contract—Liability of road for State, county and school tax.—1. Under the act of September 20th, 1852 (Sess. Acts 1853, p. 15), the Han. & St. Jo. R. R. Co. was exempt from State taxation, except as provided in section 3 of that act. But the act was not a contract between the State and the road, such as could not be altered or repealed by subsequent legislation. (State vs. Han. & St. Jo. R. R., ante p. 143.) 2. The exemption of the road under its charter of 1849 from county taxation, still remains in force. 3. Under the above acts the road is not exempt from school taxes.—Livingston Co. vs. Han. & St. Jo. R. R. Co., 516.
- 32. Revenue—Railroad taxation—Section 3 of act of March 10th, 1871, not retrospective.—Section 3 of the act of March 10th, 1871, touching taxation of railroads, (Sess. Acts 1871, p. 56) provided only for the assessment and collection of taxes upon property theretofore subject to taxation, which through inadvertence it had escaped. It did not operate "retrospectively," in the sense of that word, as used in the State Constitution.—Id.
- \$3. Revenue—Railroad school taxes—Constr. 2 13, act of March, 1871.—It was not intended by 2 13 of the act of 1871 (Sess. Acts 1871, p. 58) that railroads should pay school taxes in any other districts than those through which it

passed, or in which it held property. And the average rate of taxation spoken of in that section, on which to base the railroad tax, was to be made up from those districts, and none other. (Sess. Acts 1875, p. 129.)—Id.

34. Revenue—Railroad county tax, under act of 1871, suit may be brought in name of county.—For railroad taxes assessed under the act of 1871, (Sess. Acts 1871, p. 56, suit is properly brought in the name of the county.—Id.

25. Right given by railroad to transfer freight, etc.—Assignment of, when lawful—Repudiation of by railroad.—A contract with a railroad under which one has the right to transfer freight and passengers across a river, may be assigned with the consent of the company, and its assignment is a good consideration for a note. If the company repudiate the assignment, that fact may be set up as a defense to the note; but if the defense be traversed by replication, judgment for defendant, without testimony, is error.—Early vs. Reed, 528.

36. Railroad Corporation law—" Enclosed or cultivated fields" not merely those protected by the owner with landful fence.—The statute laying on railroad companies the obligation of fencing their tracks along "enclosed or cultivated fields" (Wagn. Stat., 310-11, § 43,) does not require that the fields should be protected by the owner with a lawful fence on other sides, in order to hold the road for failure to fence the side adjacent to the road-bed. But the incursion of stock and injuries to crops must result from the failure of the company to erect such fence. Where caused by insufficiency of the fence put up by the owner, the company will not be responsible.—Biggerstaff vs. St. L., K. C. & N. R. R. Co., 567.

See Common Carriers; Damages, 2; Eminent Domain, 1; Texas Cattle, 3. RECOGNIZANCE; See Practice, criminal, 1.

RECORD; See Conveyance, 6; Equity, 4; Judgment, 2, 3, 4; Land and Land Titles, 10, 17; Mortgages and Deeds of Trust, 6.

RECOUPMENT; See Contracts, 8.

REFERENCE; See Arbitration and Reference.

RENT; See Landlord and Tenant.

REPLEVIN.

1. Replevin—Verdict—Failure to assess the value of property—Judgment ordering return—Party entitled to receive property, when.—A judgment for the return of property in a replevin suit, under a verdict which fails to find the value of the property to be returned, is erroneous, but in the absence of any appeal therefrom is not void; and in such case, if the party recovering elects to have the property returned, and demands the same, he is entitled to receive it.—State ex rel. Johnson vs. Dunn, 64.

2. Replevin—Indemnifying bond—Solvency of sureties—Damages.—Where only one of the sureties on the indemnifying bond in a replevin suit is a resident householder, the instrument may be technically defective, but if he be good for the amount of the bond, only nominal damages can be obtained for the breach.—Id.

 Replevin—Indemnifying bond—Seal.—An indemnifying bond in a replevin suit need not be under seal.—Id.

See Justices' Courts, 3.

REPORTS OF DECISIONS.

- 1. Missouri Sup. Ct. Reports—Cost of stereotyping and pay of reporter legitimate charges against State under act of 1868—Subsequent contract.—The act of March 5th, 1868 (Adj. Sess. Acts 1868, p. 44), required the publisher of the Supreme Court Reports (\frac{3}{2}\) 1) "to keep on hand a sufficient number of each volume of said reports, or to make such arrangements as to enable the legal profession of the State to obtain said reports at the prices fixed by said contract," and (\frac{3}{2}\) "to pay for the services of a reporter," etc. Held, that under that act, and the contracts made thereunder, by the State with W. J. Gilbert, as publisher, he was authorized to adopt the plan of stereotyping the several volumes, the stereotype plates to be preserved in order to meet any subsequent demand for the volumes, in case the edition in print should "run short," or become exhausted; and that the expense of stereotyping and the salary of reporter were essential parts of the cost of publishing the Reports, and the State was liable for its proportion thereof.—State ex rel. Gilbert vs. McGrath, Secretary of State, 586.
- 2. Supreme Court Reports out of print—Contract for reprinting under act of March 8th, 1873.—The act of March 8th, 1873, (Sess. Acts, 1873, p. 30) made it the duty of the Secretary of State to furnish missing volumes of the Supreme Court Reports to Circuit and County Clerks, and that officer was authorized under its provisions to contract with W. J. Gilbert to reprint such of those volumes as were out of print.—Id.

RES ADJUDICATA; See Administration, 1, 3.

RESCISSION; See Conveyances, 2.

REVENUE.

1. County Collector—Settlements with County Court—Final settlements of, not conclusive—Sureties of may be proceeded against, how.—The action of County and Probate Courts, in regard to settlements by administrators, guardians and curators, is judicial, and, therefore, a final settlement with the court is conclusive as long as it stands, and can be set aside only on appeal, or by bill in equity brought in the Circuit Court on the ground of fraud or mistake. But settlements between County Collectors and County Courts, are merely those between principal and agent, and not subject to the same restrictions as to subsequent investigation. And in case of a County Collector, suit may be brought against his sureties without prior suit in equity to set aside the settlement.—State vs. Roberts, 402.

See Insurance, Fire, 5; Railroads, 1, 31, 32, 33, 34; Special Taxes; University, State, 1.

ROADS, COUNTY.

1. County roads—Commissioner appointed to let out contract for improving has no right to do the work himself.—A commissioner who is appointed by a County Court to "let out a contract" for certain road improvements, and to "superintend the same," and receives money to be used for that purpose, will be held responsible to the county for the money, if he fails to let out the contract, and cannot relieve himself by showing that he did the work himself, and that the amount received was actually expended by him in the improvements.—Atchison County, vs. De Armond, 19.

S.

ST. JOSEPH, CITY OF; See Corporations, Municipal, 2, 3, 4, 5. SALES; See Conveyances; Sheriff's Sales.
SEAL; See Replevin, 3.
SCHOOLS AND SCHOOL LANDS.

 Mechanic's Lien—Public school house not subject to.—A school house and lot, the title to which is vested in the State Board of Education, is not subject to a mechanic's lien. (Wagn. Stat., 907.)—Abercrombie vs. Ely, 23.

2. Schools—Sub-districts—Organization of towns with adjacent territory—Const.

Stat.—Territory embraced in a school sub-district outside of, and adjoining an incorporated town, may be organized with it for school purposes under Art II, \$\frac{2}{2}\$ 1 et seq., of the school law. (Wagn. Stat., 1262.) In such case a previous "mutual agreement" of the municipal and township boards, etc. as provided by \$\frac{2}{2}\$ 17, Id., p. 1267, is unnecessary. If, after the town sub-district is organized under the law, and Boards of Directors and of Education are duly elected and qualified, it becomes desirable to have additional territory from the township annexed for school purposes, it must be added in accordance with the provisions of \$\frac{2}{2}\$ 17.—State, ex rel. Bracken vs. Heiser, 540.

See Contracts, 5, 6; Railroads, 31,

SHERIFF'S SALES.

 Lands—Irregularities in judgment and execution affecting—Title of stranger thereto, not affected by.—Irregularities in the judgment and execution under which land is sold, cannot affect the title of one who is a stranger to those proceedings and has no notice of the irregularities at the time of his purchase. Whitman vs. Taylor, 127.

2. Land, sale of, founded on constable's nulla bona return, made in less than ninety days.—A sale of land under execution, issued on a transcript from a justice's court, is not void, collaterally, by reason of the fact that the transcript was founded upon a constable's return, made in less than ninety days from date of the execution.—Id.

Sheriff's sale not void collaterally for inadequacy of price.—Mere inadequacy
of consideration will not, of itself, render a sheriff's sale void in a collateral
proceeding.—Id.

4. Sheriff's sale—Combination of bidders will not vitiate unless designed to depress bids.—Judgment creditors may agree among themselves that one of their number shall at the execution sale bid for all, and for an amount sufficient to indemnify themselves. And such a combination will not vitiate the sale unless made for the purpose of depressing the bids.—Boyd vs. Jones, 454.

Evidence—Declarations of vendor of personal property after sale—When competent as against vendee.—The declarations of a vendor of personal property made by him while in possession after sale, are receivable against the vendee, as part of the res gesta, to make out a case of fraud against his creditors.—Id.

6. Evidence—Combination of parties to a deed to defeat creditors—Declarations of grantor after date of deed—Competent as against grantee, when—Combination must be shown, etc.—Generally the declarations of a grantor, made after the execution of his deed, cannot be made use of to defeat it; but the rule is otherwise where the parties to the instrument have entered into a common

SHERIFF'S SALES, continued.

scheme to hinder and delay the creditors of the maker, and the declarations are made by the grantor while engaged in the prosecution of that plan. But in such case the common design and undertaking must first be proved by evidence aliunde, before his declarations are admissible. The fact that the grantee subsequently assents to and joins in the fraudulent undertaking, will not render such declarations of the grantor, made prior to their confederation, competent to overthrow the deed.—Id.

See Conveyances, 9; Execution, 1, 2; Judgment, 1, 5.

SLANDER.

1. Slander—Words actionable per se—Words not, but referring to character, trade etc.—What averments and proof necessary.—Generally, words which impute an indictable offense for which corporal punishment may be inflicted—such as a charge of larceny—are actionable per se, and in such case no special damages need be alleged or proved; but where the words are not actionable in themselves, and cannot be made so by inducement, and the ground of complaint is, that plaintiff has been injured in respect to his character and reputation, his business or occupation, he cannot recover without alleging that the words were spoken of him in relation to one of these particulars, and setting out and establishing special damages. (Curry vs. Collins, 37 Mo., 324.)—Rammell vs. Otis, 365.

SPECIAL TAXES; See Corporations, Municipal, 7; Streets.

SPECIFIC PERFORMANCE; See Equity, 4.

STATUTE, CONSTRUCTION OF.

See Administration, 5, (Wagn. Stat., 120, § 8; Wagn. Stat., 344, § 16,) 7, (Wagn. Stat., 85, § 7).

BILLS AND NOTES, 7, (Wagn. Stat., 270, \$ 6;) 13, (Wagn. Stat., 661, \$ \$ 3, 4). CONTRACT, 2, (Wagn. Stat., 783, \$ 3;) 3, (Wagn. Stat., 302, \$ 10;) 6, (Wagn. Stat., 1267, \$ 13).

Convergances, 3, (Wagn. Stat., 278-9, 22 35, 36, 38;) 8, (R. C. 1855, concerning Acknowledgments).

CORPORATIONS, MUNICIPAL, 1, (Wagn. Stat., 1313;) 5, (Sess. Acts 1865, 433.)

CRIMES AND PUNISHMENTS, 1, (Wagn. Stat., 450, § 32;) 3, (Adj. Sess. Acts, 1868, 221, § 12).

Damages, 3, (Wagn. Stat., 1372, § 1).

EVIDENCE, 3, (Wagn. Stat., 278-9, 22 35, 36, 38;) 5, (Wagn. Stat., 1372, 2 1).

Executions, 3, (Wagn. Stat., 605, \$\frac{2}{5}, 9, 14; Sess. Acts, 1873, 45;) 5, (Wagn. Stat., 936, \frac{2}{5}, 19;) 6, (Wagn. Stat., 935, \frac{2}{5}, 14).

Forcible Entry and Detainer, 4, (Wagn. Stat., 642, § 3; id. 846, § 27).

Gaming Contract, 1, (Wagn. Stat., 661, 22 2, 3).

GUARDIAN AND WARD, 3, (Adj. Sess. Acts, 1866, 83).

INSURANCE, FIRE, 5, (Wagn. Stat., 732; 781, § 4; 777-8, § 44).

JUDGMENT, 2, (Wagn. Stat., 188-9, \$\frac{3}{4}\$ 36, 40;) 4, (Wagn. Stat., 1087, \frac{3}{4}\$ 20; 1034-5, \frac{3}{4}\$ 6; 1036, \frac{3}{4}\$ 19; 1037, \frac{3}{4}\$ 20; 1067, \frac{3}{4}\$ 33;) 6, (R. C. 1855, 741-2, \frac{3}{4}\$ 21).

JUSTICES' COURTS, 1, (Wagn. Stat., 850, § 19;) 2, (Wagn. Stat., 81, § 10;) 3, (Wagn. Stat., 817).

STATUTE, CONSTRUCTION OF, continued.

LAND AND LAND TITLES, 3, (Wagn. Stat., 917, \$ 5;) 5, (Wagn. Stat., 915-16, 22 1, 2;) 7, (Wagn. Stat., 917, 2 5;) 20, (R. C. 1855, concerning Acknowledgments;) 26, (Wagn. Stat. 915, & 1; 921, & 32;) 30, (915, & 1).

LIMITATIONS, 3, 7, (Wagn. Stat., 917, \$ 5;) 13, (Wagn. Stat., 915, \$ 1; 921, § 32;) 14, (Wagn. Stat., 520, § 5; 919, § 19, 26;) 17, (915, § 1;) 18, (Sess. Acts, 1867, 9; Wagn. Stat., 1336, § 24).

LIS PENDENS, 1, (Wagn. Stat., 905, § 1).

MECHANIC'S LIEN, 1, (Wagn. Stat., 907, & 1;) 2, (Wagn. Stat., 912, & 23; Sess. Acts, 1857, 668).

PRACTICE, CIVIL-APPEAL, 4, (Wagn. Stat., 814, § 10).

PRACTICE, CIVIL-PARTIES, 1, (Wagn. Stat., 850, § 19).

PRACTICE, CIVIL-PLEADINGS, 7, (Wagn. Stat., 1015, § 12;) 8, (Wagn. Stat. 1017, § 15).

PRACTICE, CRIMINAL, 3, (Wagn. Stat., 1091, § 27).

Quieting Titles, 1, (Wagn. Stat., 1022, 22 53, 54).

RAILROADS, 1, (Sess. Acts, 1871, p. 56;) 3, (Wagn. Stat., \$10, & 43;) 8, (Wagn. Stat., 1033, § 1;) 9, (Wagn. Stat., 302, § 10;) 19, (Wagn. Stat., 520, § 5; id. 919, § 19, 26;) 31, (Sess. Acts, 1853, 15;) 32, (Sess. Acts 1871, p. 56;) 33, (Sess. Acts, 1871, p. 58; Sess. Acts, 1875, p. 129;) 34 (Sess. Acts, 1871, p. 56;) 36, (Wagn. Stat., 310-11, 2 43).

REPORTS OF DECISIONS, 1, (Adj. Sess. Acts, 1868, 44, 22 1, 2;) 2, (Sess. Acts, 1873, 30).

REVENUE, 1, (Sess. Acts, 1871, 56).

Schools and School Lands, 1, (Wagn. Stat., 907, § 1;) 3, (Wagn. Stat., 1267, § 13;) 4, (Wagn. Stat., 1262, §§ 1 et seq.; id. 1267, § 17).

SWAMP LANDS, 1, (Act of Feb. 28, 1855).

TEXAS CATTLE, 1, 2, 3, (Wagn. Stat., 251, 22 1, et seq. ;) 1, (Sess. Acts, 1878, 72, 8 9).

University, State, 1, (Sess. Acts, 1867, p. 9; Wagn. Stat., 1336, 2 24).

Unlawful Detainer, 1, (Wagn. Stat., 651, § 15).

WILLS, 1, (Wagn, Stat., 541, § 16).

STOCK; See Stock, killing of; Texas Cattle.

STOCK, KILLING OF; See Railroads, 3, 4, 18, 20.

STREETS,

1. Street improvement-Contract embracing independent streets-Non-paving of a part of the streets-Tax bills for work on finished streets-Recovery on .- Where a contract for street paving embraces a number of disconnected streets, the fact that the paving on some of them is unfinished will not prevent recovery on special tax bills for work on other streets where the work has been completed. And if the paving called for by the contract, has been completed on the particular street, that is sufficient, regardless of the question whether the remainder of the street is paved, or not .- Neenan v. Smith, 292.

See Corporations, Municipal, 2, 3, 4, 5, 7.

SUBROGATION; See Mortgages and Deeds of Trust, 3.

SURETIES; See Revenue, 2; Unlawful Detainer, 1.

SWAMP LANDS.

1. Counties—Sale of swamp lands under mortgage given to counties for purchase money—Power of county to purchase at mortgage sale.—Under the act of February 28th, 1855 and the various previous acts relating thereto, the absolute title to the swamp lands in the different counties was vested in them respectively, and where purchased of the county with mortgage to secure the purchase money, the county has the right to buy them in equally as in the case of a purchase by a private mortgagee. Such a purchase is not to be confounded with the purchase of lands—such as state school lands—to which the counties never had any title. (Ray Co. vs. Bently, 49 Mo., 236; Holt Co. vs. Harmon, 59 Mo., 165.)—Linville vs. Bohanan, 554.

T.

TENDER; See Bills and Notes, 4, 5, 6. TEXAS CATTLE.

- 1. Texas cattle—Transportation from one county to another, when prohibited—Construction of statute—Measure of damages.—Under a proper construction of the statute relating to Texas cattle (Wagn. Stat., 251, \$\frac{2}{3}\$ 1), if the cattle have not been kept in this State during the entire previous winter, the law forbids their transportation from one county to another. The prohibition is not confined to those who ship or otherwise import the cattle into the State from without (see \$\frac{2}{3}\$ 9 as amended by act of March 21st, 1873, Sess. Acts, 1873, p. 72) Nor is the liability of the person, so transporting them, limited to the damages resulting from disease communicated by them while under his control or caused by his want of proper care. The statute makes him liable for all damages, direct or remote, caused by his wrongful introduction of the stock into a county and without regard to the question of negligence or caution. (The opinion of the court did not contemplate a case of damage growing out of the subsequent introduction of the stock into another county, and by another and independent owner.)—Wilson vs. K. C., St. Jo. & C. B. R. R. Co., 184.
- 2. U. S. Constitution—Texas Cattle Act no attempt to regulate inter-state commerce.—The statute relating to Texas cattle (Wagn. Stat., p. 251 & 1), is not in violation of the provision of the U. S. Constitution (Art. I, & 8), giving Congress power to regulate commerce among the several States, etc., by reason of the fact that it prohibits the introduction of all Texas cattle during certain seasons of the year. That measure was a necessary police regulation, to prevent the introduction of a contagious and dangerous disease, and in no proper sense an attempt to regulate inter-state commerce, although it might incidentally in some slight degree have an effect upon it.—Id.
- 3. Texas cattle—Transportation of from one county to another by new owner after importation—Original introducer not liable.—Where Texas cattle are, during the prohibited season, brought by a railway company into one county of the State, and afterward transported by an owner, having no connection with the road, into another county, such transportation under the law (Wagn. Stat., 251, et seq.) would be a new offense independent of the first, and for disease communicated by the cattle while in the county into which they had been so transported, the company would not be liable. (See Wilson v. Kans. City, St. Jo. & Council Bluffs R. R., ante p. 184.)—Surface vs. H. & St. Jo. R. R. Co., 216.

TRESPASS; See Land and Land Titles, 9; Railroads, 14.

TROVER; See Practice, civil, Trials, 13.

TRUST AND TRUSTEES; See Equity, 6, 7; Executions, 5; Guardian and Ward, 3; Mortgages and Deeds of Trust; Partnership, 1; Practice, civil, Trials, 13.

TI.

UNIVERSITY, STATE; See Limitations, 18. UNLAWFUL DETAINER.

1. Unlawful detainer—Appeal from justices—Summary judgment against sureties not allowed.—The statute concerning bonds on appeal from justices' courts in suits of unlawful detainer, (Wagn. Stat., 651, § 15) does not authorize a summary judgment against the sureties on the appeal bond, as in ordinary cases brought up from justices.—Powell vs. Camp, 569.

V.

VENDOR'S LIEN; See Equity, 6. VENUE.

 Venue, change of—Application for at close of term.—An application for change of venue, left undisposed of at the end of the term, is simply continued, and may be taken up and passed on at the next term. A new application is unnecessary.—Darby vs. Starke, 51.

VERDICT; See Bills and Notes, 1.

W.

WASTE; See Landlord and Tenant, 2. WILLS.

- 1. Wills—Dower, devise in lieu of—Acceptance or rejection by widow.—

 Where a will contains a devise to the widow, in lieu of dower, under our statute concerning dower, (Wagn. Stat., 541, \$\frac{2}{2}\$ 16) no acceptance of the devise is required; if nothing is done within a year after probate, the law presumes her acquiescence; but she may, at any time within the year, reject the will.
- As our law does not provide for her acceptance or election, such acceptance or election, if made, would amount to nothing, and she could, at any time within the year, reject the will, notwithstanding. And even where the will, in terms, requires "an acceptance" of its provisions, the rule is the same.—Bretz vs. Matney, 444.

WITNESSES.

Witnesses—Husoand may testify in ejectment for wife's land, when.—In ejectment for land of which the wife is not the separate owner, the husband is a substantial party, and may testify, so far as his own interests are concerned.

—Cooper vs. Ord, 420.

See Evidence, 5; Practice, civil, Trials, 11.